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IN THE

Supreme Court of the United States

October Term, 1964

No. 124

FAIRFAX FAMILY FUND, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

STATEMENT AS TO JURISDICTION.

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

STATEMENT AS TO JURISDICTION.

Opinions Below.

None of the opinions below is reported. The opinion of the District Court of Appeal (the court from which this appeal is taken) is printed in Appendix "A" *infra.* The opinion of the Superior Court (the trial court) is printed in Appendix "B" *infra.*

Jurisdiction.

1. *State Statute Held Valid Under Federal Constitution.* The ground upon which the jurisdiction of this Court is invoked is that there was drawn in question below the validity of a statute of the State of California upon the ground of its being repugnant to the Commerce Clause of the Constitution of the United States; and the decision of the highest court of the State in which a decision could be had was in favor of the validity of the statute.

2. *Application Of The Statute To Appellant.* The statute in question requires, as a condition of the right to engage in the business of making loans in amounts not exceeding $300.00, the obtaining of the State's license or permission and the payment of a license fee or tax. The proceeding had under the statute was to order appellant, by administrative fiat and thereafter by injunctive order of the courts below, to cease and desist, unless and until the license or permission of the State of California had been obtained, from carrying on its interstate business of soliciting persons resident or present in California to apply to appellant for and the making with the applicant of a loan contract in Kentucky, which business was carried on entirely by mail sent from Kentucky to the applicants in California and by the applicants to appellant in Kentucky. [See, pp. 4-5, *infra.*]

3. *The Appeal Is Timely.* The date of the judgment sought to be reviewed and of its entry was December 21, 1964. (The judgments, respectively, of the District Court of Appeal and the trial court, are printed in Appendix "C" *infra.*) A timely petition for a rehearing was filed. [*Petition For Rehearing, passim.**] It was denied on January 19, 1965. [*Order Denying Rehearing,* p. 1.] A timely petition for a hearing in the Supreme Court of the State of California after decision by a District Court of Appeal [*q.v.*] was filed. It was denied on February 17, 1965. [*Order of Supreme Court of California Denying Hearing,* p. 1.] A notice

*The Certified Record prepared by the Clerk of the court below contains the various documents to which we refer in this brief. It is not consecutively numbered but the documents included in it retain their respective original pagination. The "Clerk's Transcript" is referred to by the abbreviation "Clk. Tr."

of appeal to the Supreme Court of the United States was filed in the District Court of Appeal on March 17, 1965.

4. *Jurisdiction Is Conferred.* The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. § 1257(2).

5. *The Cases Sustain The Jurisdiction.* Cases believed to sustain the jurisdiction are: The judgment is final: *Local No. 438 v. Curry,* 371 U.S. 542, 551; *Richfield Oil Corp. v. State Board,* 329 U.S. 69, 72-74; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-384. It is directly appealable: *Standard Oil Co. of California v. Johnson,* 316 U.S. 481, 482-483; *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 289; *Bantam Books v. Sullivan,* 372 U.S. 58, 61(n.3); *Fleming v. Rhodes,* 331 U.S. 100, 103(n.4); *Poulos v. New Hampshire,* 345 U.S. 395, 402. The grounds upon which it is contended that the case is within the cases cited to sustain the jurisdiction are discussed at pages 6-11, *infra.*

6. *Statute Involved.* The state statute involved (the California Small Loan Law) will be found in the official edition in 1 California Statutes, 1951, c. 364, p. 1146. [*Cal. Financial Code,* Div. 10, beginning with section 24,000.] The statute is lengthy; its pertinent text is set forth in Appendix "D", *infra.*

Question Presented.

Is the Commerce Clause [art. I, sec. 8, cl. 3] of the Constitution of the United States violated by a statute of the State of California which, as applied to appellant, requires that appellant obtain the license or permission of the State of California and pay a license tax or fee to that State, as a condition of the right to en-

gage in the interstate business of soliciting persons resident or present in California, by mail sent from Kentucky to California, to make and mail back to Kentucky an application for, and the ensuing making in Kentucky of a loan contract with those applicants?

Statement of the Case.

1. *The Facts.* Appellant Fairfax Family Fund, Inc. (hereinafter referred to as "Fairfax") is a Kentucky corporation engaged in the mail-order small loan business. It does no business and has no offices, agents, employees or property in California; and has never qualified to do business there. It is licensed in Kentucky to do and does a general small-loan business.[1] [Clk. Tr. p. 1, line 30, to p. 2, line 4; p. 15, line 30, p. 16, line 11; p. 19, line 26, to p. 20, line 8; p. 21, line 23, to p. 22, line 3.] Its only contact with California arises out of solicitation via the mails of loan applications from people in California. The soliciting correspondence is prepared by Fairfax in Kentucky, from where it is mailed to persons in California whose names have been taken from lists of potential mail-order customers obtained by Fairfax from other concerns located outside California. A printed form of application is enclosed with the solicitation. It is returned, by those addressees who are desirous of effecting a loan, to Fairfax's offices in Kentucky. There a credit report is gotten from

[1]The Kentucky statute [*Kentucky Revised Statutes,* ch. 288] under which it is licensed is, like the California Small Loan Law, based upon and substantially a copy of the Uniform Small Loan Law drafted by the Russell Sage Foundation. [*Small Loan Laws,* Educ. Pamphlet No. 2 (Bureau of Bus. Research, Western Reserve Univ., 13th ed. 1961) pp. 2-3, 8, 9.] It expressly authorizes licensees under it to engage in the lending business by mail. [*Kentucky Revised Statutes,* sec. 288.470(2).]

one of two concerns who act as independent contractors. One of these concerns has offices in California. Fairfax officers in Kentucky pass upon the application. If accepted, a check is mailed to the borrower from Kentucky. Payments on account of the loan are mailed by the borrower to Fairfax in Kentucky. Fairfax does nothing else in or in relation to California. [Clk. Tr. p. 15, line 30, to p. 16, line 18; p. 17, lines 21-31; p. 19, line 26, to p. 21, line 27; p. 23, line 22, to p. 25, line 8.]

2. *The Proceedings Had Under The Statute.* On March 21, 1963, without notice to or hearing of Fairfax, the California Commissioner of Corporations, acting under section 24607 of the Small Loan Law [1 *California Statutes,* 1951, c. 364, p. 1155, *Cal. Financial Code,* sec. 24607], issued an order commanding Fairfax to stop soliciting or making loans in California, the expressed and only ground of the order being that Fairfax was not licensed under the California Small Loan Law. Fairfax did not stop; and the instant action was commenced by the State. [Clk. Tr. p. 3, lines 14-27; p. 6 (Ex. "B"); p. 17, lines 8-12; p. 1, lines 1-16.]

3. *The Issue Involved Below.* In this action the facts just set forth above were alleged by appellee in its Complaint and admitted by Fairfax in its Answer.[2]

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[2]The specific allegations of facts relating to Fairfax's method of doing business were not denied [see, Clk. Tr., pp. 1-3 (pars. II-IV); 15-16 (pars. II-IV)], but only the conclusions of law. An allegation of a conclusion of law tenders no issue. [*Callahan v. Broderick,* 124 Cal. 80, 83, 56 Pac. 782, 783.] The facts, therefore, were *conclusively* admitted for all purposes in the case and were not subject to contradiction or limitation by either party. [*Cal. Code of Civil Procedure,* sec. 462; *Brown v. Aguilar,* 202 Cal. 143, 149, 259 Pac. 735, 738; *Fuentes v.*

[Clk. Tr., pp. 1-3; 15-17.] The prayer of the Complaint was for an injunction prohibiting Fairfax "from engaging in the business of soliciting, negotiating or making, directly or indirectly, by mail or otherwise . . . loans of money, goods or things in action, in the amount of or of the value of $300 or less . . ." and from making any credit investigation report relative to such a loan "to a person residing in or situated in California, or from advertising such loans, or doing any act in California in furtherance of the aforementioned acts, unless and until a Small Loan License is obtained in compliance with Financial Code section 24200." [Clk. Tr., p. 3, line 28, to p. 4, line 15.]

The only defense pleaded by Fairfax was that the licensing provisions of the California Small Loan Law, as applied to Fairfax to require it to obtain California's license and to pay a license tax as a condition of engagement in its interstate lending business, were repugnant to the Commerce Clause of the Constitution of the United States. [Clk. Tr. p. 16, lines 3-11; p. 16, line 24, to p. 18, line 15.] By reason of that state of the record, decision of the constitutional question was and had to be dispositive of the case as a whole, as the conclusively admitted facts [see, note 2, p. 5, *supra*] established a violation of the statute if it was constitutional; and its unconstitutionality was the only defense raised by Fairfax. [See, pp. 7-9, *infra.*]

Tucker, 31 Cal. 2d 1, 4-5, 187 P. 2d 752, 754-755.] In addition, the facts in this regard were averred in elaborate detail in affidavits or declarations filed by Fairfax and not denied in any way by appellee. [Clk. Tr., pp. 19-25.] These averments would be receivable as evidence against Fairfax as its admissions. [McCormick, *Evidence* (1954), sec. 239, p. 502 ff; Wigmore, *Evidence* (3d ed.) vol. IV, sec. 1048, p. 2, *ff; Hall v. The Bark "Emily Banning,"* 33 Cal. 522, 525.]

A motion for a preliminary injunction co-extensive with the prayer was made and, over the opposition of Fairfax on the constitutional ground pleaded in its defense, was granted. [Clk. Tr. pp. 15-25, 30-32.] In granting the motion the trial court filed an opinion in which the constitutional question was discussed and decided adversely to Fairfax. The preliminary injunction was issued as prayed for by appellee. [Clk. Tr. pp. 15-32.]

Fairfax appealed from that determination of the matter. [Clk. Tr. p. 33.] In due course its appeal was heard by the State District Court of Appeal for the Second Appellate District. In an opinion discussing and deciding the only question raised or involved in the case, *i.e.,* constitutionality *vel non* of the Small Loan Law as applied to Fairfax, that Court affirmed. A petition for hearing by the State Supreme Court was denied.[3] The appeal to this Court then followed.

4. *The Federal Question Was Timely Raised.* The federal question here sought to be reviewed was raised by Fairfax at the first available opportunity in the trial court, *i.e.,* by appropriate averment in its Answer, the first pleading filed by it in the cause. [Clk. Tr. p. 16, lines 3-11; p. 16, line 24, to p. 18, line 15.] Those averments were, in summary, that Fairfax did nothing in California but an interstate mail-order lending business, so that to require it to get California's license or permission to engage in that business would be a direct burden upon and an attempt to regulate and control interstate commerce in violation of clause 3

[3]The District Court of Appeal, therefore, was the highest court of the State in which decision could be had. [*Michigan-Wisconsin Pipe Line Co. v. Calvert,* 341 U.S. 157, 159-160.]

of section 8 of article I of the Constitution of the United States; to apply the California Small Loan Law to exact such a requirement of Fairfax would make the statute invalid as repugnant to the cited clause of the Constitution. [Clk. Tr. p. 16, lines 4-11, 24-29; p. 16, line 21, to p. 18, line 8.]

The trial court entertained and decided that question in favor of the validity of the statute, holding it to be a constitutionally permissible regulation of interstate commerce. Accordingly, it granted the injunction sought, thus prohibiting Fairfax from engaging in its business unless it procured a California license.[4] [Clk. Tr. pp. 26-32.]

Just as was true in the trial court, the determinative question raised on the appeal to the District Court of Appeal was that of the validity of the California Small Loan Law under the Commerce Clause of the Federal Constitution. There, too, it was Fairfax's contention that the statute as applied to require the State's license or permission as a condition of engaging in its interstate lending business was an unconstitutional invasion of the Commerce power. [*Appellant's Opening Brief*, pp. 1-4, 9-26.[5]] That Court too entertained and decided

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[4]If the necessary effect of a court's ruling is to deny the claim of invalidity, as it obviously was here, a decision in favor of validity has been made even though there may have been no express statement to the effect by the court. [*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67.]

[5]In California questions are raised on appeal by presentation and argument in the briefs. Assignments of error or similar procedural devices for putting a question in issue on appeal do not exist. [*Epperson v. Rosemond*, 100 Cal. App. 2d 344, 347, 224 P. 2d 480; *California Portland Cement Co. v. Boone*, 181 Cal. 35, 43, 183 Pac. 447, 450-451; *Grayson v. Grayson*, 132 Cal. App. 2d 471, 282 P. 2d 565.]

A question of statutory construction — *i.e.*, that the statute should be interpreted as inapplicable to foreign corporations whose

the question by holding the licensing requirement not to be a burden upon or interference with interstate commerce; therefore, it affirmed the order appealed from. [Appendix "A," pp. 3-7, *infra;* Appendix "B," pp. 9-10, *infra.*] The petition for hearing in the Supreme Court was similarly directed solely to the question of constitutionality. [*Petition For Hearing,* pp. 1-3.] It was denied without opinion. [*Order of Supreme Court of California Denying Hearing,* p. 1.]

The unconstitutionality of the statute was the only defense pleaded. All the facts bearing on that defense were before the State courts in this cause; and appellant has nothing further in that regard to present at any other proceeding that may be had in it.

5. *The Judgment Below Is Final.* Considered from the whole record, rather than only the "face of the judgment" [see, *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547; *Local No. 438 v. Curry, supra,* 371 U.S. at 551] the judgment sought to be reviewed is a final one. It is that because the federal question is the dispositive and only question in the case. So, in that state of the record, and having regard to the conclusive admissions of fact made by Fairfax [see, note 2, p. 5, *supra*], and the concession of an absence of any other or different facts bearing upon the federal question, which appellant has made in this Statement, the instant decision of that question has foreclosed it and, as well, the ultimate result of the case in the State courts, leaving nothing more to be decided. [*Pope v. Atlantic Coast Line R. Co., supra,* 345 U.S. at 381-383; *Local No. 438*

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only contact with California was interstate commerce — was raised, but none of the courts below entertained or decided it. [*Appellant's Opening Brief,* pp. 38-41.]

v. Curry, supra, 371 U.S. at 550-552; *Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 72-74.]

The decision of the District Court of Appeal in the California practice establishes the "law of the case." On the same or substantially similar facts in any further proceeding in the cause, all State courts, appellate as well as lower, are bound to reach the same result. [*Tully v. Ganahl,* 151 Cal. 418, 421, 90 Pac. 1049, 1050; *Pigeon Point Ranch v. Perot,* 59 Cal. 2d 227, 230-232, 379 P. 2d 321, 322-323, 28 Cal. Rptr. 865, 866-867; *Berry v. Maywood Mut. W. Co.,* 13 Cal. 2d 185, 186, 88 P. 2d 705, 706; *Pellett v. Sonotone Corp.,* 26 Cal. 2d 705, 708, 160 P. 2d 783, 785.] The facts have been conclusively admitted. [Note 2, p. 5, *supra.*] They have, therefore, at least the force and legal effect of a stipulation of fact. [*Cf., Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 73.] And it is conceded that all the facts relating to the constitutional issue were before the courts below. [See p. 9, *supra.*] No other defense has been pleaded. No other defense or issue may be raised or decided. On the whole record, therefore, it is plain that for all practical purposes the case has been decided. Paraphrasing this Court's language in *Richfield Oil Corp. v. State Board, supra,* 329 U.S. at 73-74, "the facts have been [conclusively admitted] and the [highest court of the State] has passed on the issues which control the litigation . . . there is nothing more to be decided."

On remand from the District Court of Appeal, entry of a judgment for a permanent injunction would be a pure formality, as the conclusively admitted facts and the law of the case in respect of the Federal question established by the decision sought to be reviewed would

compel the result. In view of the pleaded admissions of fact, taking of evidence on the subject would not be necessary or permissible. [See note 2, p. 5, *supra.*] Review of that judgment in the State appellate courts too would be merely a formal proceeding; only the same question of law already decided in the cause would be before them. [See, pp. 6-7, 8-9, 10, *supra.*] Yet, that procedure in the trial and appellate courts—including an application for a hearing in the State Supreme Court, which has already refused to review the question — would have to be pursued before that question, which is already ripe for adjudication, could be brought to this Court.[6] We are not aware of any procedure in the State practice by which appellant could avoid going once again through the hierarchy of State courts and still bring the cause to the condition it is right now—ready for final review by this Court.

Substantiality of the Question.

1. *The Judgment Is Not In Accord With The Applicable Decisions Of This Court.* The result reached below is out of line with the decisions of this Court in at least three respects.

First: In an unbroken line of decision [see the numerous cases cited in *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 392(n.7)] this Court has "repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce . . ." [*Crutcher v.*

[6]Until it has declined to hear the case the Supreme Court is the highest court in the State to which the question could be taken, so it could not be by-passed without precluding review in this Court. [See, 28 U.S.C., §1257; and note 3, p. 7, *supra.* Also, *Great Western Tel. Co. v. Burnham,* 162 U.S. 339, 342.]

Kentucky, 141 U.S. 47, 58.] When, as is our case, the trader's activities in a given State are solely interstate commerce the State cannot require "a certificate of authority to do business in the State." [*Lilly & Co. v. Sav-On-Drugs,* 366 U.S. 276, 278-279.] Solicitation of orders in a State, the orders being filled by shipments from another State to the buyer, was the activity involved and held interstate commerce in most of these cases. The fact of solicitation by mail from another State rather than by personal interview in the State does not make the instant case different. In any event, in *International Textbook Co. v. Pigg,* 217 U.S. 91, it was mail order solicitation virtually indistinguishable from that involved at bar that was held to be interstate commerce not subject to the State's license.

This doctrine is a product of history. To permit the States to determine who may engage in interstate commerce and upon what terms, would be to repeat the divisive experience suffered under the Articles of Confederation—an experience the repetition of which the Commerce Clause was designed to prevent.

The question is not whether the States may regulate the local incidents of interstate commerce in a way that does not unduly burden or discriminate against that commerce. Of course they may [see, *e.g., Breard v. Alexandria,* 341 U.S. 622, 638] and appellant has never argued to the contrary. The question, rather, is whether the States may arrogate to their own and disparate jurisdictions, power over a right that is federal in its provenance and control. The courts below in necessary effect have held that they may. The correctness of such a holding is, at the very least, a debatable one. Being that, it is a substantial question.

It is thus evident that the State courts have decided a federal question of substance "in a way probably not in accord with applicable decisions of this court." That would be a substantial ground for certiorari. [See, Rev. Rules, rule 19(b).] It is no less substantial because the mode of review is appeal rather than certiorari. This is not a case in which the decision below, being in accord with a settled line of decision from this Court, is not fairly debatable. [See, *Zucht v. King,* 260 U.S. 174, 176-177.] It is one in which it is at least fairly debatable that the settled doctrine has been ignored or misconceived.

Second: Appellee contends that *Robertson v. California,* 328 U.S. 440, opens up the right to engage in interstate commerce to the States' licensing power. Whether it does is itself a substantial question needing briefing and full consideration. *Robertson,* which involved regulation of the insurance business, cannot be considered alone. It must be read together with *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, decided the same day; and read as well in the light of the entire history of the development of the law in the field of insurance regulation. That development began with *Paul v. Virginia,* 8 Wall. 168, which held that the business of insurance was not interstate commerce. The result was that in the various states, and notwithstanding any multistate aspects of the business, complete and extensive systems of regulation and licensing grew up. The penultimate step was the overthrow of *Paul* by *United States v. Southeastern Underwriters Assn.,* 322 U.S. 533. The final step was congressional permission to the States, given in the McCarran-Ferguson Act [15 U.S.C., secs. 1011-1015], to continue to regulate and

license the insurance business as they had when it was believed not to be interstate commerce.

Careful analysis and consideration of that long and complex history will show that *Robertson* lays down no rule of general application, but only one tailored for temporary, emergency use in order to prevent regulatory chaos because of the absence of any Federal system of regulation and the threatened destructive impact of *United States v. Southeastern Underwriters Assn., supra,* 322 U.S. 533, upon the existing State systems. It bridged the gap between the *Southeastern* decision and the McCarran-Ferguson Act. Whether, in the light of that history, *Robertson* applies to cases such as the one at bar is certainly a fairly arguable and, therefore, a substantial question.

Third: The District Court of Appeal was of the view that because, under the doctrine of *International Shoe Co. v. Washington,* 326 U.S. 310, California courts could probably obtain personal jurisdiction over Fairfax, the State had power to impose the requirement of a license to engage in its interstate business. But this Court has shown that "minimal contacts" sufficient to subject one to the personal jurisdiction of a State's courts do not affect the exclusive power of the National government over entry into or engagement in interstate commerce. [*Nippert v. Richmond,* 327 U.S. 416.] Here, too, the correctness of lower court's reasoning and result is, at the very least, fairly debatable, thus emphasizing the substantiality of the question presented.

2. *The Decision Will Have A Substantial Impact Upon Local and National Economy.* Interstate commerce carried on by local solicitation of orders to be

filled by shipment from another State, and the doing of such business by mail and other interstate media of communication, is not a rare or unusual phenomenon. [See, pp. 15-16, *infra*. Also, 14 *Encyclopedia Britannica* (1964) 683; 18 *Encyclopedia Americana* (1959) 139.] A substantial portion of the trade of the nation is carried on by such methods. Obviously, the decision below is applicable to any mail-order business carried on between two or more states. If permitted to stand it will subject entry into and continuance in the business to the control of each State into which the business is projected from another.

Taking only retail trade into account, mail-order houses exist in every State of the Union, ranging in numbers from only a few to as many as several hundred in each of such States as New York, California and Illinois.[7] In 1958 there were 2550 such establishments in the nation, whose total sales amounted to $1,986,168,000 and annual payrolls to $272,398,000. In the twenty-five States for which the latest figures — 1963 — are now available[8] the number had increased

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[7]The data in the above paragraph are taken from U.S. Bureau of the Census, *U.S. Census of Business; 1958*. Vol. II, Parts 1 and 2, Table 2. (U.S. Govt. Print. Off., Washington, D. C., 1961); and, so far as available at this date, from the individual State pamphlets (Nos. BC63-RA1 to RA50) of the *Census of Business, 1963*. Retail Trade, Table 101. The 1963 pamphlets are not yet available for twenty-five States (among them California, Illinois, Michigan, New York, New Jersey and Pennsylvania). These twenty-five and the District of Columbia in 1958 had 1959 mail-order houses, or 77% of the nation's total.

[8]Figures from three of them, however, were withheld. A later compilation is found in *Survey of Current Business*, March, 1965, p. S-11, published by the U. S. Department of Commerce, Office of Business Economics. It shows that retail mail order houses selling department store merchandise did an average business of $195,000,000 per month in 1964 as compared with $177,000,000 in 1963; and a total for 1964 of $2,340,000,00.

in all but Hawaii. The total increase in 1963 over 1958 was 98.3%. "With the growth of the mail order business, numerous organizations [list-brokers, list-compilers, and letter shops] have been set up to meet the needs of mail order concerns." [18 *Encyclopedia Americana* (1959), 141.] These too contribute their due to local and the national economy.

A mail-order business carried on, as Fairfax's business is conducted, entirely by correspondence between the dealing parties located in different States is "in its essential characteristics, commerce among the States within the meaning of the Constitution . . ." [*International Textbook Co. v. Pigg, supra,* 217 U.S. at 106.] To erode the rule that keeps the right of entry into such business a matter of exclusive Federal jurisdiction must inevitably have widening repercussions throughout the entire economy. ". . . Such a state of things," as Mr. Chief Justice Marshall said in *Brown v. Maryland,* 12 Wheat. 419, 447, "would break up commerce . . ." The beginning of such a break-up as the consequence of State action precipitates a substantial question, the answer to which ought to be set aright by this Court.

3. *The Historic Dividing Line Between State and Federal Power Over Interstate Commerce is Erased By The Decision.* The courts below treated this case as one involving only police-power regulation of the local incidents of interstate commerce. [See, Appendix "A," pp. 3-7, and Appendix "B", pp. 9-10, *infra.*] This Court, however, has emphatically drawn a line between the permissibility of such regulation and the impermissibility of local control of the right to engage in the commerce at all. [*Breard v. Alexandria, supra,* 341 U.S. at 638; *Leisy v. Hardin,* 135 U.S. 100, 108, 125; *Edwards v.*

California, 314 U.S. 160, 173-174.] To concede the latter right to the States would mean necessarily to give them the right to exclude, as well as merely to condition. [*Sault Ste. Marie v. International Transit Co.,* 234 U.S. 333, 340; *Leloup v. Port of Mobile,* 127 U.S. 640, 645.] That, of course, is exactly the power that the Commerce Clause was designed to deny the States. [*Brown v. Maryland, supra,* 12 Wheat. at 445; *Gibbons v. Ogden,* 9 Wheat. 1, 195-196; *Baldwin v. Seeley,* 294 U.S. 511, 522-523; *Polar Ice Cream etc. Co. v. Andrews,* 375 U.S. 361, 374-375, 379.]

Properly to demark the line between permissible regulation and impermissible control is a matter to which something more than summary consideration ought to be devoted.

Conclusion.

A substantial question under the Constitution of the United States was seasonably raised below and there decided in a way contrary to the applicable decisions of this Court. In deciding that question the State courts stepped across the line that divides State from Federal power over interstate commerce. Probable jurisdiction should be noted, to the end that the cause may be heard on its merits and decided after briefing, argument and plenary consideration.

Respectfully submitted,

HERMAN F. SELVIN,
RICHARD RUMAN,
Attorneys for Appellant.

APPENDIX "A".

Opinion of the District Court of Appeal.

This is an appeal from a preliminary injunction ordered by the Superior Court of Los Angeles County.

The action was brought by the Attorney General in the name of the People of the State of California to enjoin Fairfax Family Fund, Inc., a Kentucky corporation, from conducting a small-loan business in California until a license is obtained in compliance with Financial Code section 24200.

On December 5, 1963, the plaintfif filed a complaint for injunction and charged, among other things, that the defendant had failed to comply with Financial Code section 24200.[1] It was necessary to have the summons published for the reason that personal service of the same could not be made in California. It is set forth in the proceedings that the defendant is a Kentucky corporation, that the designated agent in Kentucky for the service of process is Prentice Hall Corporation System, Frankfort, Kentucky; that the officers (president, vice president and secretary) and incorporators of the defendant are each residents of Chicago, Illinois. On December 17, 1963, the plaintiff filed a notice of motion for a preliminary injunction. Defendant filed an answer, and affidavits in opposition to the motion for a preliminary injunction. On January 31, 1964, a preliminary injunction was granted which enjoined the defendant from engaging in the small loan business (of

[1]Section 24200 provides: *"Requirement of license.* No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner."

$300 or less) until a license is obtained in compliance with Financial Code section 24200.

The facts in part are as follows:

The defendant is a Kentucky corporation engaged in the business of making small loans by mail to residents of California and thirty-one other states. The defendant solicits its business by mailing printed material from Kentucky to persons in California. The borrower executes and returns by mail a loan application and promissory note. The defendant secures a California independent contractor to conduct a local credit investigation. If the loan is approved, a check is mailed to the borrower and all payments are made by mail to the defendant's offices in Kentucky. The defendant maintains no offices in, nor do any of its corporate officers reside in, California. The defendant has over $22,000,000 in outstanding loans of which $3,500,000 are to California residents with an increase of approximately $90,000 per week to California residents. The defendant has never secured a small loan license as required by Financial Code section 24200. As a result of the defendant's failure to secure a license, the Commissioner of Corporations issued a desist and refrain order in accordance with Financial Code section 2460[2] which the defendant refused and failed to follow.

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[2]Section 24607 provides: *"Order to cease violation; rescission.* Whenever in the opinion of the commissioner any person is engaged in business as a lender or broker as defined in this division, without a license from the commissioner, or any licensee is volating any provision of this division, the commissioner may order said person or licensee to desist and to refrain from engaging in such business or further violating this division. If, after the order is made, a written request for a hearing is filed and no hearing is held wthin 30 days thereafter, the order is rescinded."

The defendant contended at the hearing, and in this court, that it is not subject to the provisions of the California Small Loan Law since it is engaged in interstate commerce, and any attempt to subject it to this control conflicts with the commerce clause of the Constitution of the United States and is void and unenforceable as to this defendant.

Accepting the defendant's contention that it is engaged in interstate commerce, the issue before this court is whether the commece clause of the United States Constitution has, in effect, withdrawn from California the power to regulate matters of local concern (such as the present case) which affect interstate commerce?

It has been stated many times that the commerce clause, which has conferred upon Congress the power to regulate commerce, has not withdrawn from the State the power to regulate or control matters of local concern so long as Congress has not acted in the area, the regulation is nondiscriminatory and does not impose a burden on interstate commerce. (*California v. Thompson,* 313 U.S. 109.) In the areas affecting the health, life and safety of their citizens, the courts have allowed reasonable and non-discriminatory regulation. (*Huron Portland Cement Co. v. Detroit, 362* U.S. 440.)

The Small Loan Law of California is legislation designed for the public welfare. It is primarily to protect the citizens of this state from fraudulent and unconscionable conduct of those in the lending business (*In re Fuller,* 15 Cal.2d 425), and, as such, is a matter of local concern. Californians who deal, negotiate or obligate themselves to appellant should have the same

protection as is afforded to Californians who deal with local small loan concerns. There is no question of discrimination in this case in that the statutes in question apply to both interstate and intrastate lending agencies alike. There is no barrier erected by the statutes in question to stop an interstate concern from doing its business in California. The licensing is not designed to protect local companies from outside competition. The purpose of the legislation is to protect the members of the public in California from the lenders who would otherwise take advantage of them. The degree of regulation contained in the laws of this state with reference to loan sharks is not disproportionate to the evils which exist if the lenders are left to their own devices without licensing and without any regulation by the state. The charges or expenses imposed by the licensing procedure are no larger in amount than is reasonably necessary to defray the administrative expenses involved and could not in any event be classed as being discriminatory or imposing undue restrictions on interstate commerce. The investigation which is made upon the filing of an application for a license is, on its face, designed to ascertain facts which are necessary and proper under the circumstances.[3]

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[3]Financial Code section 24206 provides as follows: *"Investigation; issuance of license.* Upon the filing of the application and the payment of the fees and the approval of the bond, the commissioner shall investigate the facts and if he finds that the financial responsibility, experience, character, and general fitness of the applicant, and its members if the applicant is a copartnership or association, and its officers and directors if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this division, he shall issue and deliver a license to the applicant to engage in business in accordance with the provisions of this division at the location specified in the applicaton."

The small loan lender usually operates for that segment of the population between the poverty line and the commercial bank window. The people who patronize the small loan business are ordinarily of modest income, without resources to meet unaided the bills brought about by unemployment, sickness or other emergency, with little to pledge as security anything other than their prospects and character, and are likely to be helpless because of their ignorance.

As heretofore indicated, the defendant contends here that since it is engaged in interstate commerce, and is not doing business locally, the commerce clause prohibits California from attempting to license its business. Defendant asserts that there are no contacts with California to subject it to regulation by California, since acceptance and payment of the loan take place in Kentucky.

Under the "minimum contact rule" of *International Shoe Co. v. Washington,* 326 U.S. 310, the California courts could, in all probability, obtain personal jurisdiction of this foreign corporation. There is no doubt that negotiation for the respective loans takes place within the state, and section 24200, Financial Code, requires a license even in the case of negotiation for a small loan. A local credit investigation is secured and the collection of delinquent accounts of necessity takes place in California. The defendant admits that there are currently $3,500,000 in outstanding loans to California residents, and this amount was, at the time of the hearing in the trial court, increasing at an average of $90,000 per week. To argue that defendant is not doing business in California, but engaged only in interstate commerce is to completely ignore the facts of life and

reality. To deny California the power to license and regulate this business the same as it licenses and regulates local concerns doing the same business would, in effect, give an immunity to this defendant to which it is not entitled under the circumstances. The commerce clause does not ". . . preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration." (*Union Brokerage Co. v. Jensen,* 322 U.S. 202, 212.) Certainly the legislation in question, as heretofore indicated, is designed to protect California residents, is general in scope and imposes no undue burden on interstate commerce. Fairfax should not be allowed to escape state regulation merely because it is also engaged in interstate commerce. As a practical matter, it would be next to impossible for the state to regulate the activities of this business without the license requirement.

In *Lilly & Co. v. Sav-On-Drugs,* 366 U.S. 276, Mr. Justice Black, speaking for that court, upheld the State's right to license a foreign corporation which engaged in both interstate and intrastate commerce. The court refused to extend the immunity of *Robbins v. Shelby Co. Taxing Dist.,* 120 U.S. 489, since Lilly was engaged in local activities and not just interstate sales. In the case at bar, the defendant's activities are so localized by the very nature of its business as to cast aside the immunity of the *"Drummer"* cases.

International Text Book Co. v. Pigg, 217 U.S. 91, cited by appellant, is of little assistance to it for two

reasons. First, that was a case involving the foreign corporation's right to sue in the state court, which is not the issue before this court. Secondly, the court in the *"Text Book"* case found the license requirement to be discriminatory and a direct burden on interstate commerce. No such burden or discrimination can be found in the case before us.

It should also be noted that when the burdens imposed by local legislation become too great, Congress may legislate to secure uniformity or to protect the national interest. This is a legislative and not a judicial function, and, so far as we can determine, no such legislation has ever been enacted. (*South Carolina State H. Dept. v. Barnwell Bros.*, 303 U.S. 177.)

The order granting the preliminary injunction is affirmed.

Fourt, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

Certified for non-publication in Official Reports under Rule 976.

Wood, *P. J.*

Fourt, *J.*

Lillie, *J.*

APPENDIX "B".

Opinion of the Superior Court.

The State of California seeks to enjoin a Kentucky corporation from conducting a small-loan business in California without securing a license. Operating out of Louisville, Kentucky, defendant makes small loans by mail to residents of California and of thirty-one other states. Solicitation of borrowers is by mail. The loan application and note are mailed by the borrower to Kentucky, and the money lent by defendant comes from Kentucky to the borrower. Repayments go back by mail to Kentucky. As might be expected, defendant does not lend money to all comers but only to those about whose credit it is satisfied. Its credit investigations for California residents are performed in California by an independent contractor. Collection activities for delinquent accounts which do not respond to importunities by mail, necessarily take place in California and elsewhere at the residence of the borrower. Fairfax Family Fund presently has $3,500,000 in outstanding loans to California residents and is increasing this amount by $90,000 a week, but has not yet obtained the license to conduct a small-loan business in California which is specified in Financial Code, §24200.

Defendant argues it is doing a business across state lines which is exclusively interstate; that the commerce clause of the United States Constitution prohibits California from attempting to license its business. As authority, defendant cites the drummer cases, illustrated by *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, and the correspondence school case, *International Textbook Co. v. Pigg*, 217 U.S. 91:

Assuming the small-loan business of the defendant is interstate commerce, that fact alone does not necessarily exempt it from state regulation. A business of a type subject to regulation under the police power of a state for the protection of the health, safety, and welfare of its citizens, even though interstate commerce, may be regulated by a state until such time as the federal government has acted, provided the regulation does not discriminate against nor unreasonably burden that commerce. *Cooley v. Board of Wardens,* 12 How. 299; *Minnesota Rate Cases,* 230 U.S. 352. Even after the federal government has fully occupied the field of regulation of a particular interstate commerce, the states may continue to regulate intrastate and local aspects of the business where such regulation does not conflict with federal policy. *Huron Cement Co. v. Detroit,* 362 U.S. 440, 445-448; *Panhandle Co. v. Michigan Commission,* 341 U.S. 329; *Head v. New Mexico Board,* 374 U.S. 424.

Regulation of Fairfax Family Fund by the State of California is justified on both these grounds. Unlike the drummer for private business, the small-loan money lender is engaged in an occupation traditionally affected with the public interest and subject to the full thrust of regulation under the police power. *In re Fuller,* 15 Cal. 2d 425, 431. Assuming the business to be interstate, the federal government has not acted to regulate it, and until it has done so, the state may act. *Huron Cement Co. v. Detroit,* 362 U.S. 440, and cases there cited; *Kelly v. Washington,* 302 U.S. 1.

Additionally, the business described in this suit is one with both interstate and intrastate aspects. Obviously, no small-loan business can successfully operate without

credit investigations and without routine resort to local process for collections. In these aspects, both of which cut to the heart of any money lending, the small-loan business is intimately related to local affairs and may properly be locally licensed to protect the public welfare. The same principle applies to the writing of insurance, *Travelers Health Assn. v. Virginia,* 339 U.S. 643, and the sale of securities, *B. C. Turf Club v. Daugherty,* 94 Cal. App. 2d 320, 329. See also *Eli Lilly v. Sav-On-Drugs,* 366 U.S. 276.

This is not a case involving an interstate business whose local effects are purely incidental, such as the sale of goods by mail order. Regardless of the current constitutional status of a state's power to regulate the sale of goods across state lines (*Breard v. Alexandria,* 341 U.S. 622; *Eli Lilly v. Sav-On-Drugs,* 366 U.S. 276), a small-loan business carried on with California borrowers is subject to California regulation, both under the state's police power over interstate commerce in the absence of federal regulation, and under the state's power to regulate intrastate aspects of an interstate business in a manner which does not discriminate against nor unduly burden that commerce. There is no discrimination here. The burden is justifiable. The preliminary injunction may issue.

Dated: January 29, 1964.

Macklin Fleming
Judge of the Superior Court

APPENDIX "C".

1. Judgment of the District Court of Appeal.

[Title of Court and Cause]

The above entitled cause having been fully argued, submitted and taken under advisement, It Is Ordered, Adjudged and Decreed by the Court that the order granting the preliminary injunction is affirmed.

Respondent to recover costs.

I, J. T. Alley, Clerk of the District Court of Appeal, Second Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered on the 21st day of December, 1964, and now remaining of record in my office.

Dated: February 23, 1965.

J. T. Alley, Clerk
By Clay Robbins Jr. Deputy

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2. Judgment of the Superior Court.

The above entitled matter having regularly come on for hearing in Department 15 on January 3, 1964, pursuant to plaintiff's motion for a preliminary injunction, and plaintiff appearing by its counsel, Stanley Mosk, Attorney General, by H. Warren Siegel, Deputy Attorney General, and defendant appearing by its counsel, Herman Selvin, and the court being fully advised in the premises, and good cause appearing therefor,

It Is Ordered that during the pendency of this action, or until the court shall otherwise order, the defendant and any successor in interest, and their agents, servants, employees, and representatives, and any and all persons acting in concert or participation or on behalf of it or them, shall be and hereby are enjoined and restrained from engaging in or performing, directly or indirectly, by mail or otherwise, in the business of soliciting, negotiating or making, for itself or for others, loans of money, credit, goods, or things in action, in the amount of or of the value of $300 or less, or from directly or indirectly making or causing to be made any credit investigation or report relative to a loan, credit, goods, or things in action, in the amount of or value of $300 or less, to be, or actually solicited, negotiated or made to a person residing in or situated in California, or from advertising such loans, or doing any act in California in furtherance of the aforementioned acts, unless and until a small loan license is obtained in compliance with Financial Code section 24200.

Dated: January 31, 1964.

M. Fleming
Judge of the Superior Court

APPENDIX "D".

The Statute Involved.

24200. No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars ($300) or less, without first obtaining a license from the commissioner.

24201. Application for a license shall be in writing, under oath, and in the form prescribed by the commissioner, and shall contain the following and such further information as the commissioner requires:

(a) The name of the applicant, and if a partnership or association, the names of the members; and if a corporation, the names of each officer and director.

(b) The residence and business addresses of each person named in subdivision (a) of this section.

(c) The county and municipality with the street numbers if any, where business is to be conducted.

24202. At the time of making the application, the applicant shall pay to the commissioner the sum of one hundred dollars ($100) as a fee for investigating the application and the additional sum of two hundred dollars ($200) as an annual license fee for a period terminating on the last day of the current calendar year. If the application is filed after June 30th in any year the additional sum paid as an annual license fee shall be only one hundred dollars ($100).

24203. The applicant shall file with the application a bond in the sum of one thousand dollars ($1,000) approved by the commissioner in which the applicant

is the obligor, with one or more sureties approved by the commissioner whose liability as sureties need not exceed that amount in the aggregate.

24204. The bond shall run to the State for the use of the State and of any person who has a cause of action against the obligor of the bond under the provisions of this division. The bond shall be conditioned that the obligor will faithfully conform to and abide by the provisions of this division and of the rules and regulations made by the commissioner, and will pay to the State and to any person all money that becomes due or owing to the State or to such person from the obligor under the provisions of this division.

24205. If the commissioner finds at any time that a bond is insecure or exhausted, in whole or in part, or otherwise doubtful, the licensee shall file an additional bond in the sum of not more than one thousand dollars ($1,000), approved by the commissioner, with one or more sureties approved by the commissioner, and of the character specified in this article for an original bond. The bond shall be filed within 10 days from written demand upon the licensee by the commissioner.

24206. Upon the filing of the application and the payment of the fees and the approval of the bond, the commissioner shall investigate the facts and if he finds that the financial responsibility, experience, character, and general fitness of the applicant, and its members if the applicant is a copartnership or association, and its officers and directors if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of

the division, he shall issue and deliver a license to the applicant to engage in business in accordance with the provisions of the division at the location specified in the application.

* * *

24210. If the commissioner finds that any applicant does not possess the requirements specified in this chapter, he shall, upon reasonable opportunity to be heard, deny the application and return to the applicant the bond and the sum paid by the applicant as a license fee, retaining the one hundred dollars ($100) investigation fee to cover the costs of investigating the application. The commissioner shall within 60 days from the filing of the application for a license with the fees and the approved bond, either issue a license or file a statement of issues prepared in accordance with the provisions of Chapter 5, Part 1, Division 3, Title 2 of the Government Code.

* * *

24607. Whenever in the opinion of the commissioner any person is engaged in business as a lender or broker as defined in this division, without a license from the commissioner, or any licensee is violating any provision of this division, the commissioner may order said person or licensee to desist and to refrain from engaging in such business or further violating this division. If, after the order is made, a written request for a hearing is filed and no hearing is held within 30 days thereafter, the order is rescinded.

* * *

24608. Whenever the commissioner believes from evidence satisfactory to him that any person has violated

or is about to violate any provision of this division, or any provision of any order, license, decision, demand, or requirement, he may bring an action in the name of the people against that person, to enjoin him from continuing such violation or engaging therein or doing any act in furtherance thereof. In the action the court may enter an order or judgment awarding such preliminary or final injunction as is proper.

24609. The commissioner shall, upon notice and reasonable opportunity to be heard, suspend or revoke any license if he finds any of the following:

(a) That the licensee has failed to pay the annual license fee, to maintain in effect the bond or bonds required under this division, or to comply with any demand, ruling, or requirement of the commissioner made pursuant to and within the authority of this division.

(b) That the licensee has violated any provision of this division or any rule or regulation made by the commissioner under and within the authority of this division.

(c) That any fact or condition exists which, if it had existed at the time of the original application for such license reasonably would have warranted the commissioner in refusing originally to issue the license.

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IN THE

Supreme Court of the United States

October Term, 1965

[redacted] No. [redacted] 124

FAIRFAX FAMILY, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION TO DISMISS.

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IN THE

Supreme Court of the United States

October Term, 1964
Misc. No. 1147

FAIRFAX FAMILY, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

MOTION TO DISMISS.

Respondent, pursuant to Rule 16 of the Revised Rules of this Court, moves that the appeal be dismissed (1) on the ground that the judgment appealed from is not a final judgment or decree within the meaning of 28 U.S.C. § 1257, and hence this Court lacks jurisdiction of this attempted appeal, or, alternatively, (2) on the ground that the question presented is so unsubstantial as not to warrant further argument.

Questions Presented.

1. Whether an order granting a preliminary injunction, affirmed on appeal by the District Court of Appeal of California, hearing denied by the Supreme Court of California, constitutes a final judgment or decree within the meaning of 28 U.S.C. § 1257, which limits review of this Court to "final judgments or decrees rendered by the highest court of a State in which a decision could be had."

2. Whether nondiscriminatory state regulation of an interstate small loan company's relations with local borrowers is valid under the Commerce Clause (Art. I, § 8, cl. 3) of the United States Constitution in the absence of any applicable federal statute regulating those relations.

Statement.

The facts are fully and fairly presented in the opinions below. The opinion of the Superior Court of Los Angeles County, dated January 29, 1964, on the basis of which it issued a preliminary injunction on January 31, 1964 [Clk. Tr. 31], is printed as Appendix "B" of Appellant's Statement as to Jurisdiction. That injunction restrains, during the pendency of the action, appellant, its agents, and all persons acting in concert with appellant, from engaging in the business of soliciting, negotiating, or making loans in the amount of $300 or less, by mail or otherwise, unless and until appellant obtains a license in compliance with section 24200 of the Financial Code of the State of California.[1]

The unreported opinion of the District Court of Appeal,[2] affirming the preliminary injunction, is printed as Appendix "A" of appellant's Statement as to Jurisdiction.

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[1] Section 24405 of the California Financial Code states that no licensee shall transact the business licensed or make any loan provided for by the Small Loan Law under any other name or at any other place of business than that named in the license. Section 24406 states that licensees shall keep and use in their business, books, accounts, and records which will enable the Corporations Commissioner to determine if the licensee is complying with the provisions of the Small Loan Law and with the rules and regulations made by the Commissioner.

[2] Rule 976(b) adopted by the Supreme Court of California provides:

> "An opinion of a District Court of Appeal . . . shall be published in the Official Reports if it involves a new and important issue of law, a change in an established principle of law, or a matter of general public interest."

ARGUMENT.

I.

There Is No Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257, and Therefore This Court Lacks Jurisdiction.

The preliminary injunction appealed from specifies that it is effective "during the pendency of this action, or until the court shall otherwise order." [Clk. Tr. 31.] Its effect, under California practice, is limited to the preservation of the status quo until a hearing on the merits. *Wind v. Herbert,* 186 Cal. App. 2d 276, 283, 8 Cal. Rptr. 817, 821 (1960). It is not subject to appeal under 28 U.S.C. § 1257, which permits appeal only from "final judgments or decrees rendered by the highest court of a State in which a decision could be had." Appellant argues for an exception to the finality requirement on three bases:

1. *Law of the case.* "The decision of the District Court of Appeal in the California practice establishes the 'law of the case.' On the same or substantially similar facts in any further proceeding in the same cause, all State courts, appellate as well as lower, are bound to reach the same result." Jd. Statement, p. 10.

2. *Appellant's concession.* The "concession of an absence of any other or different facts bearing upon the federal question, which appellant has made in this Statement . . . [leaves] nothing more to be decided." *Id.* at 9.

3. *Conclusive admission of facts.* "The facts have been conclusively admitted.[3] They have, therefore, at

[3]Appellant cites note 2, page 5, of its jurisdictional statement which in turn refers to the effect to be given to pleadings and to affidavits of *Fairfax*. See page 10, *infra*.

least the force and legal effect of a stipulation of fact. [*Cf. Richfield Oil Corp. v. State Board,* 329 U.S. at 73[4] . . . No other defense has been pleaded. No other defense or issue may be raised or decided." *Id.* at 10.

None of appellant's reasons for urging the finality requirement supports appellant's conclusions:

1. *Law of the case.* Appellant cites four California cases[5] to support its argument that "law of the case" in California practice satisfies the finality requirement, leaving only the Commerce Clause issue to be decided in the ultimate disposition of this case. In none of the four cases was the law of the case discussed in relationship to a trial court proceeding to secure a preliminary injunction or an appeal from such a trial court proceeding. The most recent of the four cases states limitations which render law of the case inapplicable:

> ". . . [T]he point of law involved must have been necessary to the prior decision, [and] the matter must have been actually presented and determined by the court, . . ." *Pigeon Point Ranch, Inc. v. Perot, supra,* 59 Cal. 2d 227, 231, 379 P. 2d 321, 322 (1963).

Limitation of law of the case to matters (a) necessary to decision and (b) in fact presented and determined precludes applying law of the case to Fairfax's

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[4]Appellant's citation to *Richfield* should be "*But cf.*" In *Richfield* there *was* a stipulation, which the court carefully distinguished from an admission on the pleadings. See page 10, *infra.*

[5]*Tally v. Ganahl,* 151 Cal. 418, 421, 90 Pac. 1049, 1050 (1907); *Pigeon Point Ranch Inc. v. Perot,* 59 Cal. 2d 227, 230-32, 379 P. 2d 321, 322-23, 28 Cal. Rptr. 865, 866-67 (1963); *Berry v. Maywood Mut. Water Co.,* 13 Cal. 2d 185, 186, 88 P. 2d 705, 706 (1939); *Pellett v. Sonotone Corp.,* 26 Cal. 2d 705, 708, 160 P. 2d 783, 785 (1945).

situation.[6] The decree of preliminary injunction preserves only the status quo pendente lite and does not conclude issues which may be presented and determined in the suit for permanent injunction. *A fortiori,* an appeal from a temporary injunction in which appellant refrains from raising issues which might have been presented to the appellate court does not provide the law of the case with respect to those issues when the trial court later decides whether to grant or refuse a permanent injunction.

In *Paul v. Allied Dairymen, Inc.,* 209 Cal. App. 2d 112, 25 Cal. Rptr. 595 (1962), the District Court of Appeal reversed a trial court which, on motion for preliminary injunction, dismissed the cause of action for permanent injunction. The court said, 209 Cal. App. 2d at 121-22, 25 Cal. Rptr. at 600-601:

> "The hearing before the trial court was solely on an application for a preliminary injunction; it was not a motion for judgment on the pleadings (in fact, the only existent pleading at the time of the hearing was the complaint), nor a motion for summary judgment, and there is no stipulation in the record that the merits of the case should be determined on the evidence received on this preliminary hearing; instead of ruling on the motion for a preliminary injunction, the court

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[6]The California Supreme Court has said that law of the case may be invoked although the matter determined in a prior appeal is not "absolutely necessary" to decision in that appeal. *Steelduct Co. v. Henger-Seltzer Co.,* 26 Cal. 2d 634, 643, 160 P. 2d 804, 809 (1945). However, there has been no departure from the view that the doctrine of law of the case "does not extend to the facts or to points of law which might have been but were not presented and determined on a prior appeal." *Steelduct Co. v. Henger-Seltzer Co., supra,* 26 Cal. 2d at 644, 160 P. 2d at 809; *Trower v. San Francisco,* 157 Cal. 762, 765, 109 Pac. 617, 618 (1910).

took the matter in its own hands and dismissed the suit on a theory of lack of jurisdiction.

"It is elementary that the ultimate rights of the parties are not determined in connection with an application for preliminary injunction. In French Art Cleaners v. State Board etc. Cleaners, 91 Cal. App. 2d 890, 897 [206 P.2d 25], it is said:

" 'The effect of a preliminary injunction is explained in 14 California Jurisprudence, pages 184-185 as follows: "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or should not be restrained from exercising the rights claimed by him. Indeed, when the cause is finally tried it may be found that the facts require a decision against the party prevailing on the preliminary application. *It therefore follows that an appellate court in passing upon the propriety of the issuance or dissolution of a preliminary injunction will not determine the merits of the case in advance of the trial,* and its decision as to the propriety of granting the writ is no intimation of what the judgment of the lower court should be at the final hearing; nor is it the law of the case in a subsequent appeal from the final judgment on the merits." (Emphasis added.)' (See also O'Shea v. Tile Layers Union, 155 Cal. App. 2d 373, 378 [318 P.2d 102]; Froomer v. Drollinger, 183 Cal. App. 2d 787, 789 [7 Cal. Rptr. 268].)

"The general rule with respect to a decision on the merits in connection with an application for preliminary injunction is thus stated in 43 Corpus Juris Secundum, Injunctions, section 213, page 946: 'Unless defendant defaults in pleading, it is improper to render a final decree granting a perpetual injunction on the basis of the evidence produced on the hearing of an application for a preliminary injunction.' (Citing Ruiz v. Alfonso (La. App.) 1 So. 2d 330.)

"In the case of Anderson v. Joseph, 146 Cal. App. 2d 450, 454 [303 P.2d 1053], the rule controlling such procedure is laid down in all stringency as follows: 'In any event, unless based upon stipulation or other satisfactory showings submitting the cause on the merits, *the court was without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void.*' (Emphasis added.) (See also 27 Cal. Jur. 2d, Injunctions, § 10, pp. 114-115, as amended in 1962 Cum. Supp., p. 17, referring to p. 115, line 6 of the text.)"

We believe that the foregoing quotation accurately states the law of California in regard to matters decided on a motion for a preliminary injunction and hence with respect to the applicability of "law of the case" when an appeal from a preliminary injunction is followed by a trial related to a permanent injunction. Our concern is not so much with the Commerce Clause issue as with other issues which appellant has already raised at some point in the courts below or may raise hereafter.

Appellant misstates the record in this regard (Jd. Statement, p. 6):

> "The only defense pleaded by Fairfax was that the licensing provisions of the California Small Loan Law, as applied to Fairfax to require it to obtain California's license and to pay a license tax as a condition of engagement in its interstate lending business, were repugnant to the Commerce Clause of the Constitution of the United States. [Clk. Tr. p. 16, lines 3-11; p. 16, line 24, to p. 18, line 15.]"

By contrast, we quote with our emphasis added paragraph III of the Affirmative Defense contained in appellant's answer to our complaint in the trial court, page 18, lines 1-15 (the concluding portion of the record cited by Appellant):

> "The California Small Loan Law, on its face, and as sought to be applied to defendant, is void and unconstitutional in that:
>
> "(a) It is a direct burden upon, and an attempt to regulate, control and limit, interstate commerce in violation of clause 3 of section 8 of article I of the Constitution of the United States.
>
> "(b) *It provides for and purports to permit, without any guarantee of notice or of an opportunity to be heard, the prohibition of the doing business by defendant by an order of an administrative official, in violation of the due process and equal protection clauses of section 1 of the Fourteenth Amendment to the Constitution of the United States.*"[7]

[7]Appellant also raised, in its answer, the defense that it was not negotiating or making small loans in California. We agree with

Obviously, the decision of the District Court of Appeal affirming the Preliminary Injunction is not the law of the case with respect to the issue appellant tendered in the emphasized portion of its answer, just quoted.

2. *Appellant's concession.* Appellant refers to its "concession of an absence of any other or different facts bearing upon the federal question, which appellant has made in this [Jurisdictional] Statement." Jd. Statement, p. 9. We would like to read this as a concession that an adverse decision on the Commerce Clause issue would conclude appellant's rights and would entitle the People of California to a permanent injunction as prayed. *Cf. Steelduct Co. v. Henger-Seltzer Co.,* 26 Cal. 2d at 644, 160 P. 2d at 809. We would like also to be assured that appellant would, by such a concession, be precluded from changing its mind.

Unfortunately, nothing appellant has expressly told this Court or any of the courts below appears to commit appellant to the abandonment of all issues but the Commerce Clause. Indeed, appellant concluded its Petition for Hearing in the Supreme Court of California with an argument based on *Allgeyer v. Louisiana,* 165 U.S. 578 (1897), and *State Board of Insurance v. Todd Shipyards Corp.,* 370 U.S. 451 (1962) (insurance cases), that the California Small Loan Law, if constitutional under the Commerce Clause, violates the

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appellant, however, that sufficient facts are admitted in the pleadings to permit the superior court on remand to find as a matter of law that appellant's loans *are* negotiated in California.

Due Process Clause. Appellant's Petition for Hearing in the Supreme Court after Decision by a District Court of Appeal, p. 24. Hence, we need not reach the issue of the effect of a concession or stipulation in satisfying the finality requirement. We do not have such a concession or stipulation.

3. *Conclusive admission of facts.* Appellant's assertion that "the facts have been conclusively admitted" (Jd. Statement, p. 10) is based on California Code of Civil Procedure section 462 (Jd. Statement, p. 5, n. 2), which provides that "every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; . . ." However, section 473 of the same code provides liberal discretion in the trial court to permit amendment of the pleadings.

Pleadings do not have, in California practice, "the force and legal effect of a stipulation of fact." This is the precise teaching of *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 72-73 (1946), where the final judgment requirement for purposes of appeal to this Court was held to be satisfied *because there was a stipulation.*

However, even if the pleadings did conclusively establish the facts pleaded, this would not conclude the trial court's inquiry into additional facts. *Perez v. Perez,* 111 Cal. App. 2d 827, 828-29, 245 P. 2d 344, 345 (1952). In its Petition for Hearing in the Supreme Court of California, Fairfax complained first of the

relevance of facts recited in the District Court of Appeal's opinion with respect to residence of Fairfax's officers. Then it went on:

> ". . . They are, in any event, incompetent, being found in the record only as hearsay statements in a declaration of a deputy attorney general filed in support of an application for an order for publication of summons. [Clk. Tr. p. 9, lines 8-29.] Hearsay in an affidavit of declaration is just as incompetent as hearsay from the witness stand."
>
> Petition for Hearing in the Supreme Court after Decision by a District Court of Appeal, p. 5, n. 5.

We fully recognize that the major thrust of appellant's argument, in the courts below as well as here, has been directed at the Commerce Clause issue. It is nevertheless clear beyond dispute that the Commerce Clause issue has not been, in any sense, Fairfax's only asserted defense. It is clear that there has been no waiver of other defenses, unless Fairfax has made such a waiver in its jurisdictional statement in this Court. It is clear that Fairfax has not precluded itself, nor have we, from presenting additional evidence, even on the Commerce Clause issue, in a trial on the merits for a permanent injunction.

Both the letter and the policy of the final judgment requirement, on the present state of the record, dictate dismissal of the appeal for lack of jurisdiction.

II.

Appellant Presents No Substantial Federal Question Because, in the Absence of Any Applicable Federal Regulation of the Small Loan Business, California's Nondiscriminatory Regulation Is Clearly Valid Under the Commerce Clause of the United States Constitution.

Broadly stated, the issue presented herein is whether the Commerce Clause of the United States Constitution deprives California of the ability to protect California borrowers in their dealings with foreign lenders as thoroughly as the borrowers are protected in their dealings with purely local lenders.

First enacted in 1939, California's Small Loan Law is similar in many respects to Kentucky's law. It is modeled on one of several drafts promulgated by the Russell Sage Foundation after a study beginning in 1907. By 1953, 38 states, with over 80 percent of the national population, had small loan laws substantially based on one of the drafts by the Russell Sage Foundation. Henderson, *The Future of the Loan Shark and Consumer Credit Agencies,* 19 Law & Contemp. Prob. 127, 128 (1954).

The license requirement of California's Small Loan Law and the regulatory requirements concomitant therewith apply to all lenders, foreign and domestic. Fin. Code §§ 24007, 24200, 24206; Calif. Adm. Code, Tit. 10, Art. 1, § 1407.*

California's law is not a revenue measure. *Cf. Cox v. New Hampshire,* 312 U.S. 569, 576-77 (1941); *Gt. Northern Ry. v. Washington,* 300 U.S. 154, 160-

*See Appendix.

62 (1937). The initial charge of $100 for investigation of license applications and the continuing charge of $200 per year is, as the court below declared, "no larger in amount than is reasonably necessary to defray the administrative expenses involved." Jd. Statement, App. "A," p. 4.

The California Supreme Court in 1940 upheld the Small Loan Law against assaults on its contitutionality which the court described as so "many and varied" they left "unchallenged practically nothing but the punctuation." *In re Fuller,* 15 Cal. 2d 425, 439, 102 P. 2d 321 (1940). The California Supreme Court's opinion in *Fuller* contains an excellent description of the abuses which have made small loan legislation a necessary supplement to the usury laws. Necessitous condition of borrowers, their frequent ignorance and inability to avoid unconscionable transactions, finance charges ranging as high as 1300 percent, all added to make the Small Loan Act a necessity to protect the public from fraud, deceit, and sharp practices in the making of loans.[8]

Fairfax has followed practices which are contrary to California state law. Its inviting literature ("Get the

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[8]California Financial Code section 24206 states:

"Upon the filing of the application and the payment of the fees and the approval of the bond, the commissioner shall investigate the facts and if he finds that the financial responsibility, experience, character, and general fitness of the applicant, and its members if the applicant is a copartnership or association, and its officers and directors if the applicant is a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of this division, he shall issue and deliver a license to the applicant to engage in business in accordance with the provisions of this division at the location specified in the application. (Stats. 1951, c. 364, p. 1148, § 24206.)"

CASH you want for any good reason By MAIL—privately") contains this misleading assurance:

> "RATES SET BY LAW—The cost of the loan depends on how much you borrow and how long you keep it. To this extent you control the cost. Our rates conform with the provisions of the State Law governing the making of loans. You can now borrow the money you need and repay in monthly payments, fitted to your paydays and income." [Clk. Tr. p. 5-F.]

Unsophisticated California borrowers may be excused from failing to understand that by "State Law" Fairfax means "Kentucky State Law." In fact, Fairfax's rates exceed those permitted by California law.[9]

Fairfax's contacts with residents of California are substantial and numerous. Although licensed under the Kentucky Small Loan Law, all of its officers are in Chicago. [Clk. Tr. pp. 2, 9.] It lends in 32 states; only since March 1963 in California. Yet, as of the filing of the complaint herein in December 1963, over one-sixth of its $22,000,000 outstanding in loans, or $3,500,000, were to California residents. This $3,500,000 in Cali-

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[9]Rates for Fairfax loans are higher than permitted by §§ 24451, 24452 and 24454 of the California Financial Code. The Fairfax note [Clk. Tr. p. 5-H] provides for charges at the rate of 2.5 percent per month on unpaid balances not in excess of $150, and 2 percent per month on unpaid balances exceeding $150 but not exceeding $500. These rates are ½ of 1 percent per month in excess of the rates locally permitted for loans from $100 to $150. (§ 24452.) Fairfax also makes a charge of $.75 per $100 of credit life insurance. [Clk. Tr. p. 5-F.] When this fee is added as a charge for the loan, all of Fairfax's rates exceed those rates permitted by § 24452. California permits credit life insurance, but not at the expense of raising the maximum finance charge. (§ 24454.) Kentucky permits lenders to add a charge for credit life insurance to the maximum finance charge.

fornia loans increased at the rate of $90,000 per week. [Affidavit of Albert R. Bell, Clk. Tr. pp. 19-22.] These figures do not permit segregation of Fairfax's loans subject to regulation—*i.e.*, those of $300 or less—but doubtless such loans make up a significant portion of the total.

Appellant's contention that its activities in California cannot be regulated or licensed under the Commerce Clause is based primarily on the drummer type cases (*e.g., Crutcher v. Kentucky,* 141 U.S. 47, 58 (1891); *International Textbook Co. v. Pigg,* 217 U.S. 91 (1910); *Eli Lilly & Co. v. Sav-On-Drugs,* 366 U.S. 276 (1961)) and on interstate transportation cases (*e.g., Edwards v. California,* 314 U.S. 160 (1941); *Sault Ste. Marie v. Int'l Transit Co.,* 234 U.S. 333 (1941)).

Fortunately, the constitutional attack has no substance. Major predicate of the assault is the dictum, quoted from *Crutcher v. Kentucky,* 141 U.S. 47, 58 (1891): "We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, . . ." (Quoted in Jd. Statement, p. 11.)

We have no quarrel with *Crutcher v. Kentucky,* which held invalid a Kentucky statute requiring a license in order to do an interstate express business. Nor have we any quarrel with the dictum quoted from a court which in 1891 had no reason to suspect that a mail order small loan business—any more than a mail order insurance business[10]—is interstate commerce. We do quarrel with Appellant's wrenching the 1891 dictum

[10]The *Crutcher* court noted expressly that its decision did not apply to insurance and other matters within the state's police power to regulate. 141 U.S. at 59, 61. See footnote 11, *infra,* p. 20.

from its historic context and identifying it as "an unbroken line of decision" for which the collection of seventeen cases in *Memphis Steam Laundry v. Stone,* 342 U.S. 389, 392, n.7 (1952), is cited by appellant. Here is the proposition for which that court cited those seventeen cases (342 U.S. at 392-93):

> "In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. . . ."

The seventeen cases cited in note 7 are identified by the court as "cases in this Court following the *Robbins* decision." *Memphis Steam Laundry* itself may be taken as epitomizing the principle. It held invalid a $50 per vehicle tax imposed by Mississippi on laundry trucks soliciting business and laundry "for a laundry not licensed in this state as such." The statute was invalid alternatively because it was a tax imposed on interstate commerce itself, or if imposed only on Mississippi incidents of interstate commerce, it was discriminatory because not applicable to Mississippi laundry trucks. There is nothing of that problem here. The tax and the license requirement are imposed only on the incident of negotiation of small loans within the State of California, whether by California or non-California lenders. We do not have here any tax imposed for revenue purposes.

Any "unbroken line of decision" on which appellant may rely was fractured irreparably by *Robertson v. California,* 328 U.S. 440 (1946).

Robertson v. California, arose after *United States v. Southeastern Underwriters,* 322 U.S. 533 (1944),

and thus is a decision rendered on the premise that the insurance transactions there involved were interstate commerce, 328 U.S. 440, 447, 461-62.

In the *Robertson* case, California would not grant any insurance company a certificate of authority to transact insurance in California unless certain reserve and capital requirements were met. 328 U.S. 440, 454-55; Calif. Ins. Code § 700, *et seq.* These requirements, enforced by requiring a license, were meant to protect the public from fraud, misrepresentation, and sharp practice in the selling of insurance. 328 U.S. 440, 447. The defendant insurance agent claimed that the *Southeastern Underwriters* case precluded California from regulating the company's solicitation and writing of insurance in California, and further that the California law discriminated against the out-of-state insurer. 328 U.S. at 455-56.

Though no actual fraud, misrepresentation, deceit, or sharp practice was shown on the part of the particular company (328 U.S. at 460), the Supreme Court held: (1) that the California law was not discriminatory because the same requirements applied to foreign and domestic companies alike, and (2) that California, in protecting its citizens, could exclude any insurance company not meeting her reserve, capital, and licensing requirements. 328 U.S. at 456-57.

The court said (328 U.S. at 458-59):

> ". . . we are far beyond the time when, if ever, the word 'license' per se was a condemnation of state regulation of interstate business done within the state's borders. The commerce involved here is not transportation. Nor is it of a sort which touches the state and its people so lightly that local

> regulation is inappropriate or interferes unreasonably with the commerce of other states. Not the mere fact or form of licensing, but what the license stands for by way of regulation is important. So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative. For the commerce clause is not a guaranty of the right to import into a state whatever one may please; absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance."

Or, we add, improper or potentially improper loans.

To the same effect is *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 212 (1944):

> "The Commerce Clause does not . . . preclude a State from giving needful protection to its citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration."

Appellant argues that *Robertson* lays down no rule of general application but was tailored to a temporary insurance situation. Jd. Statement, p. 14. It is submitted that this Court took no such limited view of the rules announced in the *Robertson* case. In footnotes 25 and 28 to that case, 328 U.S. at 458-59, the court listed several cases involving regulation other than that of insurance in which results compatible with *Robertson* were

reached. The *Robertson* case itself has been applied to state regulation of matters other than insurance. *Independent Warehouse v. Scheele,* 331 U.S. 70, 85 (1947) (upholding a license tax as applied to warehouses storing interstate coal shipments); *Mercer v. Hemmings* (Fla.), 170 So. 2d 33, 38-39 (1965) (local licensing of out-of-state public accountants).

Where Congress has not acted, state statutes regulating interstate commerce are constitutional vis-a-vis the Commerce Clause provided they neither discriminate against nor substantially obstruct the commerce. *Robertson v. California,* 328 U.S. 440, 449; *California v. Thompson,* 313 U.S. 109, 114. In *Breard v. Alexandria,* 341 U.S. 622, 633-37, especially notes 15-22 thereto, the court pointed up the distinction between those cases in which the license is a means of police power regulation of a particular business for the protection of the local public and those cases in which the licensing statute serves to discriminate against interstate commerce or substantially to obstruct or exclude interstate commerce. The license in *Robertson* was upheld because it was of the regulatory rather than exclusionary nature. *Cf. International Textbook Co. v. Pigg, supra,* 217 U.S. 91 (1910). The license involved here is also a regulatory one.

Appellant's reliance on cases involving interstate transportation is also misplaced. These are areas of regulation in which, unlike the instant problem, the courts have expressed a need for national uniformity. *E.g., Edwards v. California,* 314 U.S. 160, 175-76. To be sure, *Edwards* held that California cannot exclude the entry of persons from other states. However, it did not say that once they were here we cannot

require them to obtain California driver's licenses. In the instant case, we are not attempting to keep Fairfax out, but now that it is in California, we ask that Fairfax obtain the same license held by all other members of the small loan business. That we may constitutionally require Fairfax to do so is shown by the parallel of the instant case to *Robertson v. California, supra,* 328 U.S. 440.[11]

Finally, Appellant attempts to discredit the decision of the District Court of Appeal by stating in paragraph "Third" at page 14 of its Jurisdictional Statement, that the District Court of Appeal said

> "that *because,* under the doctrine of International Shoe Co. v. Washington, 326 U.S. 310, California courts could probably obtain personal jurisdiction over Fairfax, the State had power to impose the requirements of a license to engage in its interstate business." (Emphasis added.)

We italicize the "because," which is a word the District Court of Appeal did not use, either expressly or by implication. We read the opinion as referring to *International Shoe Co. v. Washington* to illustrate the effect of a local nexus, in addition to negotiation, collection, and other substantial lending activity, which tends to illustrate the necessity of local regulation.[12] All the

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[11]The instant situation differs not at all from the problems of insurance regulation discussed in *Robertson.* Prior to *Southeastern Underwriters* neither insurance nor loan contracts were considered to be commerce. *Paul v. Virginia,* 8 Wall. 168 (1868); *Standard Home Co. v. Davis,* 217 Fed. 904, 915 (D.C.E.D. Ark.) (1914). The right of states to license these businesses was unquestioned. *Robertson* illustrated that even after *Southeastern Underwriters,* and before the McCarran Act, the states could continue to license the business of insurance. This same result should follow for the lending business.

[12]It should be noted that the courts below have found that with the exception of the final acceptance of the loan agreement by

court below concluded was that the state can regulate the small loan business, even that of a foreign lender, where there is a substantial local nexus with, and impact of that business on, local borrowers.

For the public's present and future protection, California asks only that Fairfax meet the same requirements that must be met by any company in the small loan business in California. If appellant's contentions were accepted, foreign lenders could disregard our regulatory and licensing requirements. The state would be helpless to protect its citizens against loosely regulated foreign lenders. The historical system of state control of lending would break down. Since Congress has enacted no small loan legislation a vacuum would be created in which the standards for the industry, in-state as well as foreign, would be set by the state with the least restrictive regulations, or no regulations at all. The small loan laws of the states having over 80 percent of the population would be, for all practical purposes, frustrated.

In similar circumstances, on more than one occasion, this Court has demonstrated its antipathy, absent some expression by Congress, to overturning state regulatory legislation where an absence of any regulation would result. *Robertson v. California, supra,* 328 U.S. 440, 459-60; *California v. Thompson,* 313 U.S. 109, 115.

Far reaching implications — all of them bad — would flow only from a reversal of the decision below. None of consequence would flow from the affirmance, except enforcement of a California law in effect since 1939.

Fairfax, and the sending of the check to the borrower, everything relative to the loan, including negotiation, takes place in California.

Conclusion.

The judgment appealed from is not final. Even if the judgment were final, no substantial federal question is involved in this appeal. The right of California to regulate by means of a license the local contacts of a foreign lender is sustained by clear authority. Therefore, this appeal should be dismissed.

Respectfully submitted,

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APPENDIX.

Relevant California Financial Code Sections Not Quoted in Text.

§ 24007. *Lender.* "Lender" includes all persons who are engaged in the business of lending their own money, credit, goods, or things in action.

§ 24410. *False or misleading advertising.* No person shall advertise, print, display, publish, distribute, or broadcast or cause to permit to be advertised, printed, displayed, published, distributed, or broadcast, in any manner any statement or representation with regard to the rates, terms, or conditions for making or negotiating loans, which is false, misleading, or deceptive, or, in the case of a licensee, which refers to the supervision of such business by the State or any department or official of the State.

§ 24451. *Maximum interest rate.* No licensee shall make any loan of three hundred dollars ($300), or less, and contract or receive thereon interest at a rate exceeding ten percent (10%) per year, computed on the unpaid balance of the loan.

§ 24452. *Charges for service and expense; maximum aggregate amount of charges and interest.* No licensee shall contract for or receive any service or expense charges beyond the actual outlay. The charges for actual outlay, when added to interest computed at the rate permitted by this article, shall not exceed an aggregate amount of two and one-half percent (2½%) per month on that portion of the unpaid principal balance of any loan not in excess of one hundred dollars ($100), and two percent (2%) per month on any remainder of such unpaid principal balance.

§ 24454. *Charges in excess of maximum.* No amount in excess of that expressly permitted by this article shall be directly or indirectly charged contracted for, or received, by any person, and the total charges including interest, of the lender, the broker, and any other person, in the aggregate, shall not exceed the amount permitted by the article on any one loan for the negotiating, making, collecting, and enforcing of the loan.

§ 24458. *Enforcement of out-of-state loans.* A loan lawfully made outside the State of the amount or value of three hundred dollars ($300) or less, may be enforced in this State as to the unpaid principal balance of the loan together with the interest, consideration, brokerage, and all other charges, to the extent of but not to exceed the unpaid principal balance and the aggregate amount of interest, consideration, brokerage, and all other charges permitted by this division in connection with a loan of the same amount made within this State.

§ 24459. *Collection of out-of-state loans.* Any person who collects or attempts to collect in this State the unpaid principal balance of a loan made outside the State, and a greater aggregate amount of interest, consideration, brokerage, and all other charges in connection with such loan than is permitted by this division in connection with a loan of the same amount made within this State, is subject to the provisions of this division.

California Administrative Code.

Title 10, Article 1, Section 1407

1407. *Definitions.* (a) The signification attached by statute to a particular word shall apply to said word as used in these rules. As the Personal Property Brokers Law and California Small Loan Law are special statutes containing specific definitions, such definitions shall apply in these rules as said rules relate to companies subject to said Personal Property Brokers Law or California Small Loan Law, respectively.

(b) In addition to the definitions incorporated herein by reference, the following terms used in these rules shall have (unless the context otherwise indicates) the following meanings:

(1) *Company.* The word "company" includes all domestic and foreign private corporations, associations, syndicates, joint stock companies, partnerships of every kind, trustees and individuals.

(2) *Finance Company.* The term "finance company" means a company subject to the Personal Property Brokers Law or California Small Loan Law.

(3) *Acts.* The word "acts" includes the Personal Property Brokers Law and the California Small Loan Law, whichever is applicable.

(c) A finance company, a company affiliated with such finance company, and/or the officers and employees of such finance company and/or such affiliate shall be subject to these rules and regulations whenever said rules and regulations apply to a lender.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1147

FAIRFAX FAMILY FUND, INC., a corporation,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS.

Summary of the Argument.

The argument in support of the motion to dismiss concerns itself with a challenge to the finality of the judgment, and, therefore, the jurisdiction of the Court. The difficulty with this part of the argument is that its major premise is based on a complete misinterpretation of *Richfield Oil Corp. v. State Board,* 329 U.S. 69. It ascribes to that decision a distinction of fact, and an implied holding as a consequence of that distinction, that were not made in it; and it ignores entirely the ultimate facts upon which the decision was based, as well as the existence in the case at bar of the same ultimate facts. Those ultimate facts are that the facts bearing upon the federal issue, which is determinative of the case, have been conclusively established in the case; the law of the case for the state courts has been

settled on that issue by the State's appellate courts; and so, there is nothing further to be decided there.

In view of that factual identity between this and the *Richfield* case, the latter's rationale is plainly applicable here. On the whole record and resorting to the local law fixing the effect of the law of the case upon future proceedings, the judgment, as on directly analogous facts it was held to be in *Richfield*, is final.

The contention that an appellate decision upon an issue raised and decided in connection with an application for a preliminary injunction is not the law of the case is flatly contrary to the rule established on that precise point by the State's highest court. Nor is it a correct or relevant premise in appellee's argument that a decision of a trial court in connection with such an application does not control that court's determination of the ultimate issue in the case. This contention confuses such an interlocutory and, therefore, changeable decision upon the issue involved in the application by a trial court, with an appellate decision passing upon the issue. The latter of necessity controls future disposition of the issue in the cause whenever it arises on the same facts.

Appellee's discussion of the substantiality of the question presented, as well as its restatement of the question, betrays the same disregard of the real and only issue in the case as has characterized appellee's strategy from the beginning of the case. [*Mo.*, 2, 12-21.[1]] By

[1]The Statement As To Jurisdiction is referred to in this brief by the abbreviation "*Juris. State.*"; the Motion To Dismiss by "*Mo.*"; and the appellant as "Fairfax." The briefs and petitions filed in the court below are found in the Record here and are referred to by their respective titles. [See, *Juris. State.*, 2 (footnote).]

substituting for the word "license" the word "regulate," appellee diverts the argument from the question whether a State may require its permission as a condition on the right or privilege of engaging in interstate commerce, to the question whether a State may regulate the local incidents of that commerce. Only the former question is or could be involved in the instant case.

Engagement in interstate commerce is not within the area of State control; regulation of local activity, even though arising from such commerce, is. The assertion that regulation of the mail-order small loan business is necessary, raises only a policy consideration for Congress. A State's impatience or dissatisfaction with that body's action or inaction does not give the State a power over interstate commerce withheld from it by the Constitution of the United States. Appellee's argument is based on *Robertson v. California,* 328 U.S. 440, but accurately read and analyzed that case is seen to be a local-regulation decision, not a case involving a State license as a condition of engaging in interstate commerce.

The assertion of violations by Fairfax of local regulatory conditions relating to solicitation representations and loan charges, is entirely irrelevant, being a matter not pleaded, raised or decided below, and not bearing upon the power to license engagement in interstate commerce, as distinguished from regulation of its localized incidents. It is, at any rate, without factual support. The solicitation material clearly made it known that a loan would be governed by the law of Kentucky; and the loan charges were substantially lower than permitted by that law, to which the validity of the loan contract is referred by its own terms and by the law of California.

ARGUMENT.

I.

The Judgment Is Final, Since on "the Entire Record [and] Resort to the Local Law" [Richfield Oil Corp. v. State Board, 329 U.S. 69] There Was Nothing More to Be Decided in the State Courts.

1. The facts bearing upon the sole issue involved and decided by the highest state court to which the question could be taken, were conclusively established by admissions in the pleadings. [*Juris. State.*, par. 3, pp. 5-7.] In *Richfield Oil Corp. v. State Board, supra,* 329 U.S. 69, they were so established by a stipulation of the parties. Seizing upon that immaterial difference appellee asserts that this Court "carefully" made just that distinction in *Richfield* and that, therefore, the decision is inapplicable here. [*Mo.* 4 (note 4), 10.] *No such distinction was made in the case.* It could not have been made consistently with the rationale of the decision.

The significance of the stipulation in *Richfield* was that it conclusively established the facts for all purposes thereafter in the case. Because it had done so, and because the State's highest court had "passed on the issues which control the litigation . . . there [was] nothing more to be decided . . ." [329 U.S. at 73-74.] In the case at bar the admissions in the pleadings accomplished exactly the same purpose as did the stipulation in *Richfield*—they conclusively established the facts for

all purposes of the case thereafter.[2] [*Juris State.*, 5 (note 2), 10.] Because they did so establish the facts, they had "at least the force and legal effect of a stipulation of fact . . ." [*Juris. State.*, 10.]

Appellee's reply to this statement by us [*Mo.*, 10] misses or evades the substantive point; and depends on reading into *Richfield* a distinction and, therefore, an implied holding that were not made. It follows that the case at bar is directly within and controlled by the rationale and holding of *Richfield*.[3]

2. So far as the doctrine of "law of the case" is involved in the reasoning leading to the conclusion that the lower court's decision left nothing more to be de-

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[2]Appellee, citing *Perez v. Perez*, 111 Cal. App. 2d 827, 828-829, 245 P. 2d 344, 345, says, "even if the pleadings did conclusively establish the facts pleaded, this would not conclude the trial court's inquiry into additional facts . . ." [*Mo.*, 10.] The cited case does not support or even faintly intimate support of the quoted assertion. What was there considered and decided had nothing at all to do with the effect of an admission in the pleadings. What was decided was that in hearing a motion — for which, in California, the evidence is usually presented by affidavits [*Fuller v. Lindenbaum*, 29 Cal. App. 2d 227, 230, 84 P. 2d 155, 157] — the court may, if it so desires, receive other forms of evidence, *i.e.*, oral testimony from witnesses personally present in court.

[3]*Richfield* was not the only decision of this Court cited by us in support of jurisdiction. [*Juris. State.*, 3, 9-10.] Appellee maintains complete silence about the others. Yet they, equally with *Richfield*, show that on the whole record the judgment here is final for appellate purposes.

Similarly, appellee does not deny that an admission of a fact in the pleadings conclusively establishes the fact. [See, *Juris. State.*, 5 (note 2).] The fact that, conceivably, leave to amend the pleadings may be granted [*Mo.*, 10] does not change the effect of the admission. Such leave could also have been obtained with respect to the stipulation in *Richfield*, as this Court noted. [329 U.S. at 73 (note 1).] Nonetheless, the judgment was held to be final.

cided [*Juris. State.*, 10-11], one of appellee's counters is that the doctrine is inapplicable because the purpose of a preliminary injunction is only to preserve the *status quo* and does not involve final determination of the ultimate issue in the case. [*Mo.*, 4-7.] The contention is not borne out by the cases appellee cites; and it is, in fact, directly contrary to a controlling decision of the State Supreme Court. [*Moulton v. Knapp*, 88 Cal. 446, 447, 26 Pac. 210. See, also, *Hirsch v. San Francisco*, 143 Cal. App. 2d 313, 317-318, 300 P. 2d 177, 180-181.] As the two cases just cited show —especially *Moulton*—when an issue of law is decided on an appeal from the granting or denial of a preliminary injunction, the decision is the law of the case in respect of that issue whenever on the same facts it reappears; and when it does reappear the decision must be followed.

The case vouched to appellee's support in this connection—*Paul v. Allied Dairymen, Inc.*, 209 Cal. App. 2d 112, 25 Cal. Rptr. 595—is very much different. There, upon a hearing of a motion for a preliminary injunction the trial court erroneously reached beyond the only matter before it and attempted to decide the case finally on the merits. Obviously, that has nothing to do with the law of the case. The dicta in the opinion about the effect, upon the ultimate rights of the parties, of the determination of the application for a case, are beside the point in a case, such as the one at bar, where it is an *appellate* decision that is relied upon.[4]

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[4]Law of the case deals only with the effect in subsequent proceedings of a decision of an appellate court upon review of some ruling or determination in the case. It does not deal with the effect in the trial court phases of the case, of some earlier ruling by the trial court. [*Lawrence v. Ballou*, 37 Cal. 518, 521; *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 326, 283

Appellee's argument is based on the untenable assumption that the *only* purpose of a preliminary injunction is to preserve the *status quo*. That, to be sure, is its usual purpose; and it is generally assumed to be the purpose "in the absence of any record of the court's reasons" for issuing it. [*French Art Cleaners v. State Board,* 91 Cal. App. 2d 890, 896-897, 206 P. 2d 25, 28.] At bar, however, we have a "record of the court's reasons" — the opinions of the trial and appellate courts. [*Juris. State.,* Appendices "A" and "B".] In each of these there will be found no point discussed or decided other than the Commerce Clause issue. Neither court purported or intimated that its decision granting or affirming the granting of the injunction was based upon any purpose or intention to maintain the *status quo*. It was based, in each instance, on a determination that the statute sought to be applied was constitutional. [See, *Juris. State.,* Appendices "B" and "C", pp. 1-10, *passim.*] It is not unusual or improper in California to make the outcome of a preliminary injunction depend on the ultimate issue in the case. [See, *Brock v. Superior Court,* 12 Cal. 2d 605, 86 P. 2d 805.]

More importantly, preservation of the *status quo* could not have been the purpose of the injunction in the instant case. Its intended purpose and actual effect was to *change* the *status quo* by compelling Fairfax to

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Pac. 298, 309.] That is why the decision in the trial court of an application for a preliminary injunction does not settle any issue then decided, or preclude the possibility of a further or different decision in later stages of the case in that court. The decision of an appellate court upon an issue, however, settles the law for that issue throughout the rest of the case. The situation at bar is of the latter variety.

cease a substantial part of the interstate business it was then, and for several years had been, carrying on.[5]

3. As one ground of unconstitutionality, Fairfax pleaded the statute's failure to provide for notice or an opportunity to be heard before a cease and desist order could be issued. [*Clk. Tr.*, p. 18, lines 9-15; *Mo.* 8.] The determinative or controlling effect of the Commerce Clause ground is not, however, affected by that additional ground. In the first place, the ground was not urged in or entertained or decided by any of the courts below. [See, appellant's briefs filed in the courts below, *passim*; and the opinions below, *passim* [*Juris. State.*, Appendices "A" and "B", pp. 1-10.] In the second place, the statute provides for notice and an opportunity to be heard promptly after an order is made. [*Cal. Fin. Code*, sec. 24607; *Juris. State.*, Appendix "D", p. 15.] That complies with the requirements of due process. [*American Sur. Co. v. Baldwin*, 287 U.S. 156, 168; *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29, 31; *Phillips v. Commissioner*, 283 U.S.

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[5]That preservation of the *status quo* is not the only purpose is shown by the fact that in California it is no objection to a preliminary injunction that for the period of its duration it awards the complete or permanent injunctive relief the plaintiff seeks on the merits of the cause. [*Elsis v. Evans*, 157 Cal. App. 2d 399, 408, 321 P. 2d 514, 520; *Family Record Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 246-247, 342 P. 2d 10, 17-18.] It is further shown by the fact that a preliminary injunction may be mandatory in form and effect, thus compelling a change of the *status quo*. [*Piper v. Hawley*, 179 Cal. 10, 19, 175 Pac. 417, 421; *Pacific Gas & Elec. Co. v. Minnette*, 115 Cal. App. 2d 698, 708-709, 252 P. 2d 642, 648; *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. 575.] Actually, an important, if not the most important function of a preliminary injunction is to prevent irreparable injury *pendente lite*, the accomplishment of which purpose may or may not involve preserving the *status quo*. [See, *E. H. Renzel Co. v. Warehousemen's Union*, 16 Cal. 2d 369, 372-373, 106 P. 2d 1, 2-3; *Schwartz v. Arata*, 45 Cal. App. 596, 601, 188 Pac. 313, 315.]

589, 596.] And, even without that, the opportunity, which is accorded, to defend against a cease and desist order in a plenary action such as the instant one, is due process. [*Cf., Bianchi v. Morales,* 262 U.S. 170; *Phillips v. Commissioner, supra,* 283 U.S. at 595.] Even if that were not so, the statute's defect in the respect alleged would not make its licensing provisions inapplicable; at most it would simply invalidate the administrative cease and desist order.

It follows, that even if the notice point had been urged it would not have eliminated the Commerce Clause question or the necessity of deciding it. If the statute were held constitutional under that Clause, the admitted facts being what they are, an injunction exactly like the one that was issued would have to be issued notwithstanding the notice defect. Thus, the controlling question in the case would still be the Commerce Clause question. And upon that question the law of the case, as established by the judgment here involved, would be conclusive in the State courts, and compel a decision of that question in favor of the statute's constitutionality and the consequent issuance of an injunction. [*Moulton v. Knapp, supra,* 88 Cal. at 447, 26 Pac. 210; *Steelduct Co. v. Henger-Seltzer Co.,* 26 Cal. 2d 634, 642-643, 160 P. 2d 804, 808-809.]

Clearly, the Commerce Clause question was and is the basic issue in the case. The facts on the issue were all before the courts below. The question of law raised by that issue is dispositive of the case upon the same facts; and it has been passed upon by the highest state court to which it could be taken. That is enough to establish finality.[6]

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[6]Appellee refers to a due process contention based upon *Allgeyer v. Louisiana,* 165 U.S. 578, and *State Board of Equali-*

II.

California's Effort to Uphold a Right to Determine Who May Engage in Interstate Commerce, in the Face of Exactly Contrary Decisions From This Court, Proves the Question Is Substantial.

1. Appellee's argument directed at the substantiality of the question is nothing more than an emotional plea for regulation of the small loan business to protect the "public from fraud, deceit and sharp practices." [*Mo.*, 12-15, 21.] It wholly evades the real issue in this case. That issue is not whether a State has the power to engage in such regulation, even in respect of the local incidents of an interstate lending business. There is not a single word in the complaint filed by appellee that tenders any issue in that regard or any issue of violation by appellant of local regulations applicable to it.[7] The issue here goes to a deeper and from the national standpoint at least, a more important question—which sovereign, Nation or State, shall determine who may engage in interstate commerce? The need,

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zation v. Young's Market, 299 U.S. 59. [*Mo.*, 9.] That was not an original contention in the cause or part of appellant's pleaded defense of unconstitutionality. It came into the case in rebuttal to appellee's irrelevant argument that regulation of the lending business was a valid exercise under the due process clause of the State's police power. It was designed to show that appellee's due process discussion was incomplete. [See, *Appellant's Closing Brief*, pp. 36-37, in the court below.] The reference to that proposition in the Petition For Hearing in the Supreme Court, pp. 23-24, was made for the same purpose and to show that in taking up appellee's contention the District Court of Appeal's discussion was similarly incomplete.

[7]Accusations of such violation, not made in the pleadings, not litigated below, and not litigable in this case, because not pleaded, are made in the Motion to Dismiss. [*Mo.*, 13-14.] The accusations are without merit, as we shall show. [See, Appendix, *infra.*]

or lack of need for regulation of the interstate lending business has nothing to do with that question.

The Congress cannot be assumed to be incapable of governing or to be oblivious to the country's needs, or those of the States in respect of a matter exclusively within the national control. In the past it has shown that it knows how to meet its responsibilities in these respects, either by itself enacting needed legislation to protect the public from fraud, deceit or sharp practices in interstate trade;[8] or by giving the States permission to act. [See, note 9, *infra.*]

Without that permission the States are powerless to control entry into or engagement in interstate commerce, although they have the power to regulate the local incidents of the commerce. If the Congress, as the sole custodian of national legislative policy, does not act, its failure or inertia does not clothe the States with a power denied them by the constitution. The Federal-State relationship not infrequently prevents a State from doing as it would like to do in matters confided by

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[8]Among a considerable number of such regulatory statutes, in many of which there are licensing provisions, the following are illustrative: *Securities Act of 1933,* 15 U.S.C., ch. 2A, beginning with §77a; *Securities Exchange Act of 1934,* 15 U.S.C., ch. 2B, beginning with §78a; *Investment Companies Act,* 15 U.S.C., ch. 2D, beginning with §80a-1; *Weights and Measures,* 15 U.S.C. ch. 6, beginning with §231; *Natural Gas Act,* 15 U.S.C., ch. 15A, beginning with §715; *Commodity Exchange Act,* 7 U.S.C., ch. 1, beginning with §1; *Cotton Standards Act,* 7 U.S.C., ch 2, beginning with §51; *Grain Standards Act,* 7 U.S.C., ch. 3, beginning with §71; *Packers & Stockyards Act,* 7 U.S.C, ch. 9, beginning with §181; *Warehouse Act,* 7 U.S.C., ch. 10, beginning with §241; *Perishable Agriculatural Commodities Act,* 7 U.S.C., ch. 20A, beginning with §499a; *Meat Inspection Act,* 21 U.S.C., ch. 4, beginning with §71; *Virus, Serum and Toxin Act,* 21 U.S.C., ch. 5, beginning with §151; *Food, Drug & Cosmetic Act,* 21 U.S.C., ch. 9, beginning with §301.

the constitution to the national government.[9] That is the price the State must pay for being a part of the Union. It cannot, because of impatience or dissatisfaction with Congressional charting of national policy, interpose its own sovereignty or legislation, thus seceding *pro hac vice* from the responsibilities of the Constitution of the United States. [*Cf., Cooper v. Aaron,* 358 U.S. 1, 17-19; *United States v. Louisiana,* 364 U.S. 500.]

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[9]For example, long before the 18th Amendment or the Volstead Act several States had prohibited the sale or possession of liquor; but they were powerless to stop the importation of the prohibited beverage in interstate commerce from other States [*e.g., Bowman v. Chicago etc. Ry. Co.,* 125 U.S. 465; *Leisy v. Hardin,* 135 U.S. 100], until Congress consented to their doing so. [Act of Aug. 8, 1890, c. 728, 26 Stat. at L. 313; Act of Mar. 1, 1913, c. 90, 37 Stat. at L. 699.] States adopting so-called "Fair Trade" price-fixing as a desirable policy, had to suffer price-cutting on goods in interstate commerce, until Congress consented to making the State legislation applicable to such goods. [15 U.S.C. §1.] So, too, after insurance had been declared to be a commodity in interstate commerce, extensive state licensing and regulation of the business was consented to by Congress. [15 U.S.C., §§1011-1015.] States whose public policy banned price-fight films as detrimental to public morals could not keep them out when imported in interstate commerce, until Congress had consented. [15 U.S.C., §1001.]

The States may not, by their local law of unfair competition give exclusivity to a design that under the patent laws is in the public domain, because to do so would be contrary to the national policy evinced by the patent and copyright clause. [*U.S. Const.,* art. I, sec. 8, cl. 8; *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225; *Compco Corp v Day-Brite Lighting, Inc.,* 376 U.S. 234.] They may not create or recognize a cause of action for libel that infringes rights protected by the First Amendment [*New York Times Co. v. Sullivan,* 376 U.S. 254.] Because of the coinage clause, they may "no longer declare what shall be money or regulate its value . . ." [*Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 545; *U.S. Const.,* art. I, sec. 8, cl. 5.] And, of course, a great deal of regulatory activity is closed to the States by the First and Fourteenth Amendments. [See, *e.g., Griswold v. Connecticut* (June 7, 1965) ..... U.S. ....; *Brown v. Board of Education,* 347 U.S. 483; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393.]

It is the meaning of the Commerce Clause, though appellee disregards it, to bring to an end the interposition into the nation's policy by the States of their own ideas of what is good for the country's commerce. It is a meaning felicitously expressed by Mr. Justice Holmes in a much quoted passage when he said:

> ". . . I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to en." [Holmes, *Collected Legal Papers* (Harcourt, Brace and Howe, 1920) pp. 295-296.]

Appellee's position historically is not a new one. When decisions limiting what some thought were the rights of the States over corporations doing an interstate business were first handed down [*e.g., Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489; *Leisy v. Hardin, supra,* 135 U.S. 100; *Western Union Tel. Co. v. Kansas,* 216 U.S. 1; *International Textbook Co. v. Pigg, supra,* 217 U.S. 91] there were the usual cries of havoc and predictions of doom. [See, Warren, *The Supreme Court In United States History* (Little, Brown & Co., 1935) vol. II, pp. 631-697, 717-718. And generally, for similar reactions to almost any decision that interfered with unlimited and uncontrolled activity by the States in pursuit of a parochial rather than a national policy, see *Op. Cit.*, vol. I, pp. 92-102, 506-509, 514-525, 541-559, 616-621, 690-699, 715-

723, 753-761, 768-773; vol. II, 540-546, 578-584, 626-631, 650-651, 697, 717-718.] The transient agitation produced by such decisions has never influenced this Court to permit the States to do "what the Commerce Clause was meant to end."

The commerce question here is made substantial by the very fact that California through its Attorney General claims and the State courts have upheld a right to legislate in a way that will prevent entry into interstate commerce without the State's permission; the right, in short to do "what the Commerce Clause was meant to end." [See, *Brown v. Maryland,* 12 Wheat. 419, 445-449; *Gibbons v. Ogden,* 9 Wheat. 1, 196-199; *Polar Ice Cream etc. Co. v. Andrews,* 375 U.S. 361, 374-375; *Leisy v. Hardin, supra,* 135 U.S. at 125.]

2. Appellee's discussion of substantiality is really a discussion, not of that subject, but of the merits of the ultimate issue in the case. As such it is mainly based on *Robertson v. California,* 328 U.S. 440, which, appellee says "irreparably fractures" the unbroken line of license cases that establish the rule upon which we rely, and which were referred to by this Court in *Crutcher v. Kentucky,* 141 U.S. 47, and also recently approved in *Lilly & Co. v. Sav-On Drugs,* 366 U.S. 276, 278.

Appellee quite correctly says that in *Crutcher,* this Court "held invalid a Kentucky statute requiring a license in order to do an interstate express business . . ." [*Mo.,* 15.] Yet, it does not stop to explain why there is no substantial question raised by a directly contrary holding from a State court bound to accept this Court's interpretation of the constitution as the supreme law of the land. [*Cooper v. Aaron, supra,*

358 U.S. at 18.] Appellee does stop, however, to complain of our "wrenching" of a "dictum" from *Crutcher* out of context — a complaint that has no basis in fact.[10] [*Mo.*, 15-16.] No doubt, as appellee points out, *Crutcher* was decided in 1891. But as late as 1961 this Court in *Lilly & Co. v. Sav-On Drugs, supra,* 366 U.S. at 278, expressed its satisfaction with the rule, expressly citing among others, *Crutcher* and *International Textbook.*

But, appellee argues, this "unbroken line of decision" referred to in *Crutcher* and reaffirmed in *Lilly* has been "fractured irreparably" by *Robertson v. California, supra,* 328 U.S. 440. [*Mo.*, 16.] Strangely enough when, only a few years after *Robertson,* this Court decided *Lilly* in reliance upon the "well established" line of decision exemplified by *Crutcher* it did so even though *Robertson* was cited in the *Lilly* briefs. Obviously, this Court did not think that *Robertson* had "fractured" that well established line.

3. We have anticipated in part [see *Juris. State.*, 13-14] appellee's reliance on *Robertson.* It is not in fact an interstate-business license case but one of local regulation. Consideration of the *Robertson* opinion in exploration of this assertion must be divided into two parts in addition to the one suggested in the *Jurisdiction-*

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[10]Appellee is not specific, but very likely it refers to the short quotation from *Crutcher* at page 11 of the Jursidictional Statement. The "context" in which the quoted excerpt appears in the opinion is a discussion and approval of the proposition that if the matter were within the State's jurisdiction, the licensing requirement there involved might "be promotive of the public good . . ."; but interstate commerce is a Federal right exclusively within the national jurisdiction, into which the States cannot encroach by requiring a license to carry on such commerce [141 U.S. at 56-57.] Our quotation accurately reflects that context.

al Statement, pages 13-14. The first part was concerned with the question whether the State may require a license of an insurance broker or agent, carrying on his business wholly within the licensing State but who, at least on occasion,[11] had some contact with interstate trade, such as following up a mail solicitation and urging the addressee to apply for a policy. The agent was not otherwise in interstate commerce. This Court held that the State had an interest in "his *localized* pursuit of this phase of the comprehensive process of conducting an interstate insurance business. . ." [328 U.S. 448-449. Italics ours.] It was held, however, that this pursuit was not such as to put the agent himself in the position of being in or substantially affecting interstate commerce. Consequently, there was no bar from the Commerce Clause to the State's requirement of a license of the agent. [328 U.S. at 444-445, 447-451.]

Of the decisions cited in support of that holding, a typical one is *Hartford Acc. & Indem. Co. v. Illinois,* 298 U.S. 155, 157-158. As the following excerpt from the opinion in that case shows, the thrust of the discussion there, and so in *Robertson,* is at regulation of local phases of commerce, not at the power to license engagement in it:

> ". . . The statute is a police regulation. The business regulated is local, having its situs within the state and being conducted therein. The fact that the commission merchant contracts to sell, and sells, farm produce forwarded to him from

[11]It does not appear in the report of the case whether the agent who was prosecuted did any work other than of the kind for which he was accused of violating the license statute. [See, *Lilly & Co. v. Sav-On Drugs, supra,* 366 U.S. at 278-279.]

> points without, as well as points within, the state is not enough to condemn the regulation of a business carried on within her borders. Such effect as the regulation has upon interstate commerce is indirect and incidental and does not trespass upon the power conferred on Congress by Article 1, §8, of the Federal Constitution. In these circumstances, until Congress, under the commerce power, adopts inconsistent legislation, that of the state remains effective." [298 U.S. at 157-158.]

The difference from the case at bar, in which the sole question is power to license engagement in interstate commerce, is obvious.[12] Here, the effect of exercise of the State's licensing power upon interstate commerce is direct and substantial, embracing as it does the power to stop it altogether — a power which the State has so far effectively exercised against Fairfax.

The second part of *Robertson* was concerned with the prohibition against brokers and agents in the State acting for "nonadmitted" insurers, and its effect upon interstate commerce. The insurer there involved had declined to comply with the State's minimum reserve requirements, imposed upon all insurers alike for the protection of policyholders in the State. While the argument apparently traversed a wider range [see 328 U.S. at 452], this Court construed the question presented to be, and the question at which its discussion was directed was, whether "California, as a result of

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[12]Two of the cases upon which the Court relied in this connection — *Union Brokerage Co. v. Jensen*, 322 U.S. 202, and *California v. Thompson*, 313 U.S. 109 — are also cited by appellee at bar. [*Mo.*, 18, 19.] They are distinguishable in the respect here under discussion on the same ground as *Robertson*.

the Southeastern decision, no longer can require foreign insurance corporations seeking to do business there to maintain minimum reserves for protection of policyholders in the state or compel agents or brokers to refrain from representing them there notwithstanding such noncompliance." [328 U.S. at 455-456.] It was in that discussion that there was talk about excluding commerce, and from which appellee culls the excerpt it quotes at pages 17-18 of its Motion.

The difference between that question and the one involved at bar is illustrated by the cases upon which the *Robertson* holding was made to depend. They were the "quarantine" cases, of which *Rasmussen v. Idaho,* 181 U.S. 198, is typical. There a statute banned the bringing into Idaho of sheep from areas in other states which the Governor had found and proclaimed to be areas in which there were epidemic conditions rendering sheep from those areas to be likely to convey disease in Idaho. It was held valid. Before that, a somewhat similar statute in Missouri barring, for eight months of each year the importation of Texas, Mexican or Indian cattle, had been invalidated in *Railroad Company v. Husen,* 95 U.S. 465. This Court's distinction of *Husen* in *Rasmussen,* serves to indicate the distinction between the instant case and *Robertson.* The Court in *Rasmussen* said:

> "It will be perceived that the act [in *Railroad Co. v. Husen*] was an absolute prohibition operative during eight months of each year. It was an act continuous in its force; provided for no inspection, and was predicated on the assumption that the State had the right to exclude for two thirds of each year the introduction of all those kinds of cattle, sick or well, and whether likely to distribute disease or not.

> "In the case before us the statute makes no absolute prohibition of the introduction of sheep, but authorizes the Governor to investigate the condition of sheep in any locality, and, if found to be subject to the scab or any epidemic disease liable to be communicated to other sheep, to make such restriction on their introduction into the State as shall seem to him, after conference with the state sheep inspector, to be necessary." [181 U.S. at 201.]

In *Robertson* this Court noted that what was involved was imposition of reserve standards upon all companies doing or seeking to do business within the State [328 U.S. at 458], and that this was in effect local regulation against fraudulent and unsound insurance. [328 U.S. 460.] That brought the case within the ambit of *Rasmussen* and similar "quarantine" cases. It was in this connection that the Court said that use of the word "license" did not *per se* condemn "state regulation of interstate business done *within* the State's borders . . ." [328 U.S. at 458. Italics ours.] The thrust of the discussion strikes at the power of local regulation, not at the power to control the Federal right of engaging in interstate commerce.

4. Notwithstanding that no issue was tendered respecting, nor any effort made below to enjoin, alleged violations of the local regulatory provisions of California's statute, appellee makes some references to some such alleged violations in respect of Fairfax's loan charges and its solicitation letter.[13] [*Mo.*, 13, 14.]

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[13]We need not interrupt the argument of substantiality to discuss these irrelevant charges. We discuss them, therefore, in an Appendix to this brief.

If there were any local violations of any part of the statute fairly applicable to Fairfax, appellee's remedy was clear. It could have proceeded administratively or sued, to compel cessation of the alleged violative practices.[14] [*Cal. Fin. Code,* secs. 24607, 24608; *Juris. State.,* Appendix "D", pp. 15-16.] It did not do so. It limited both its administrative proceeding [Clk. Tr. p. 6] and its suit entirely to the failure to get the State's license to do business at all. [*Juris. State.,* pars. 1-3, pp. 4-7.] The irrelevancy to any issue in the cause, and, *a fortiori,* to the question of substantiality, of the present belated effort to inject these matters into the case is patent upon the face of the record.

Furthermore, the loan charges are not violative but lawful; and the assertion that there is a "misleading assurance" in the solicitation letter [*Mo.,* 13-14] is even more misleading than the quoted "assurance." [See, Appendix, *infra.*]

The sum of appellee's argument in the present proceeding is that in its view the court below was right in ultimate result. That is not an argument touching the substantiality of the question, unless it is so clear that the lower court was right that there cannot be any reasonable debate about it. [See, *Zucht v. King,* 260 U.S. 174, 176-177.] Clarity to that degree of certainty, however, is wanting, for *Crutcher, International Textbook, Lilly* and the many other cases like them, make the correctness of the decision below at least fairly debatable, if they do not indeed demonstrate conclusively how wrong that decision is. That is sub-

[14]As the event of the present action shows, there would be no difficulty in obtaining the necessary order for service of process upon Fairfax. [*Clk. Tr.,* pp. 8-12.]

stantiality. [See, *United States v. Tod,* 264 U.S. 134, 135-136.] The necessity of reconciling the opposing arguments and the separate lines of decision upon which those arguments respectively depend is not a task for summary disposition; especially so when the subject matter and its historic and omnipresent importance to the federal structure are taken into account.

Conclusion.

The motion to dismiss should be denied, and probable jurisdiction noted.

Respectfully submitted,

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APPENDIX.

I.

Comparative Charges.

1. Fairfax's charges are lawful in Kentucky, and, therefore they are lawful in California. [See, sec. 2, *infra.*] The maximum rates respectively permitted by Kentucky [*Ky. Rev. Stats.,* sec.] and California [*Cal. Fin. Code,* sec. 24452], and the rates actually charged by Fairfax (exclusive of an insurance charge of 75¢) [*Clk. Tr.,* p. 5g] are shown in this table:

Principal Acount	Ky.	Cal.	Fairfax
Up to $100	3%	2½%	2½%
$100 to $150	3%	2%	2½%
$150 to $300	2%	2%	2%

The difference between Kentucky's and California's maximums is $1.00 per month (plus two or three cents for the insurance charge) until the unpaid balance is reduced to $150, after which the difference decreases each month in proportion to the decrease of that balance. The important point, however, is that Fairfax's rates are lower than Kentucky's. The difference between California's rates and those charged by Fairfax therefore, is 25¢ per month until the balance or unpaid principal is reduced to $150, after which it decreases until that balance is $100. From then on Fairfax's charges are the same as the California rate.

2. The last act necessary to make the loan contract effective takes place in Kentucky. [*Clk. Tr.,* p. 20, lines 15-25.] It is, therefore, a Kentucky contract. [*Michelin Tire Co. v. Coleman & Bental Co.,* 179 Cal. 598, 604, 178 Pac. 508, 510; *Monarch Brewing Co. v. Meyer Mfg. Co.,* 9 Cir., 130 F. 2d 582, 585.] The con-

tract charges are concededly valid in Kentucky. [See, *Mo.*, 14, note 9.] So, they are valid in California. [*Fenton v. Edwards & Johnson,* 126 Cal. 43, 46, 58 Pac. 320; *Mercantile Acceptance Co. v. Frank,* 203 Cal. 483, 485, 265 Pac. 190, 191.] Furthermore, the contract stipulates for application of the law of Kentucky. That is a valid provision [*Seeman v. Philadelphia Warehouse Co.,* 274 U.S. 403, 407-409; *Merchants and Manufacturing Secur. Co. v. Johnson,* 8 Cir., 69 F. 2d 940, 943-944, *cert. den.* 293 U.S. 569]; and of a kind to which California will give effect. [*Boole v. Union Marine Ins. Co.,* 52 Cal. App. 207, 209-210, 198 Pac. 416; *People v. Globe etc. Ins. Co.,* 96 Cal. App. 2d 571, 573, 575, 216 P. 2d 64, 65-66, 67; *Cal.* [*Uniform*] *Commercial Code,* sec. 1105(1).]

Kentucky's maximum charges would not be obnoxious to California's public policy, for the latter State's policy permits higher or equal charges in respect of analogous types of loans. [See, *Nevcal Enterprises v. Cal-Neva Lodge,* 194 Cal. App. 2d 177, 180-182, 14 *Cal. Rptr.* 805 807-808.] For example, a personal property loan may be made at a rate of 2½% on the unpaid balance up to $200 (instead of $100 as in the case of a small loan) and 2% on the unpaid balance in excess of $200 [*Cal. Fin. Code,* sec. 22451]; industrial loan companies may also charge 2½% up to $200, but 1½% on the excess [*Cal. Fin. Code,* sec. 18655]; and the rates permitted pawnbrokers are the same as on small loans. [*Cal. Fin. Code,* sec. 21200.] For banks and other financial institutions whose principal business is lending money, there is no limit on the rate they may charge borrowers. [*Wolf v. Pacific S.W. etc. Corp.,* 10 Cal. 2d 183, 184, 74 P. 2d

263, 264; *Penziner v. W. Amer. Fin. Co.,* 10 Cal. 2d 160, 177, 74 P. 2d 252, 260; *Cal. Const.,* art XX, sec. 22.*

II.

Solicitation Representations.

With each mail solicitation sent to a prospective borrower in California there were included, not alone the circular [*Clk. Tr.,* p. 5f] to which appellee refers [*Mo.,* 13-14], but two other circulars [*Clk. Tr.,* pp. 2, lines 4-11, 5a-5h.] In one of these there is a complete copy of the loan agreement used. [*Clk. Tr.,* p. 5h.] It makes it clear that the controlling law referred to in the solicitation is the law on Kentucky. It provides:

> ". . . the principal amount checked at right, which is the actual amount of the loan, together with charges at the agreed rate specified below, as provided in Kentucky Rev. Stat., Chapter 204, Sec. 13 . . .
>
> ". . . Payee herein is licensed to make loans in the State of Kentucky as provided in Chapter 204, Kentucky revised [*sic*] Statutes, 1960 and acts amendatory thereto. It is agreed that the validity and construction of this note shall be determined under and by virtue of the laws of the State of Kentucky . . ."

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*There are two sections numbered "22" in article XX. The reference here is to the second one. It exempts from the maximum rate of interest, subject to legislative fixing of a maximum, (which, with respect to at least the following has not been done), banks, building and loan associations, credit unions, agricultural cooperatives loaning or advancing money, and the like.

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